

SUMMARY OF BOARD ITEM

ITEM # 02-9-7: Public Hearing to Consider Amendments to Administrative Hearing Procedures ("Administrative Penalty Program") – Title 17, California Code of Regulations (CCR) 60065.1 Et Seq. (Administrative Hearing Procedures for the Review of Complaints), and CCR 60075.1 (Administrative Hearing Procedures for the Review of Citations).

STAFF RECOMMENDATION: The staff recommends that the Air Resources Board approve the proposed amendments to sections 60065.1 et seq. and 60075.1 et seq., title 17, California Code of Regulations. The Legislature (Senate Bill 527) recently vested the ARB with additional authority to administratively assess civil penalties as an alternative to judicial penalties for lesser violations of all ARB adopted rules and regulations under parts 1 through 4, division 26 of the Health and Safety Code (HSC) and most air pollution violations under part 5, division 26 of the HSC. Senate Bill (SB) 527 enacted HSC sections 42410 and 43023 and provides that the maximum administrative assessments are to be the lesser of the judicial penalty amount authorized by the HSC for the violation in question, or \$10,000 per day per violation, with total penalty assessments not to exceed \$100,000. HSC §§42410 and 43023 specifically directs ARB to use ARB's existing administrative hearing regulations to implement the program.

DISCUSSION: SB 527 provides an alternative means to enforce specific provisions of the HSC and ARB adopted rules and regulations. The intent of the legislation is to allow the ARB flexibility to pursue administrative penalties and adjudication for those violations that are less severe and complex and that involve smaller penalties.

Prior to the enactment of SB 527, all other provisions of division 26 of the Health and Safety Code within the ARB's purview could only be enforced judicially.

In response to other directives of SB 527, the staff has proposed the following modifications to title 17, CCR §60065.1 et seq. and CCR §60075.1 et seq.:

Clarify that an administrative civil penalty would be issued as an alternative to a judicial civil penalty and not be cumulative;

Make clear that ARB's administrative penalty authority only extends to those categories of violations for which it maintains authority to impose judicial civil penalties;

Clarify that an administrative law judge appointed by the Department of General Services, State Office of Administrative Hearings (OAH) would conduct all hearings authorized by HSC §42410 and §43023;

Amend both hearing procedure regulations to add civil penalty limits in accordance with SB 527; and

Amend the existing criteria used for assessing penalties for fuel violations to also apply to assessments for violations covered under HSC §43023 and adding a new provision establishing penalty assessment criteria for violations covered under HSC §42410.

Additionally, the staff is proposing to make other minor modifications to the hearing procedures for purposes of clarity and conformity with other state administrative hearing procedures.

SUMMARY OF IMPACTS:

ARB has found that administrative assessments and adjudication for less complex and serious violations afford more efficient and expeditious process for all parties, and allows the ARB to better utilize its enforcement resources.

The adopted procedures will have no environmental impacts and no cost or economic impacts. This proposal will not adversely impact any community in the State, especially low-income or minority communities.

TITLE 17. CALIFORNIA AIR RESOURCES BOARD

NOTICE OF PUBLIC HEARING TO CONSIDER AMENDMENTS TO ADMINISTRATIVE HEARING PROCEDURES - "ADMINISTRATIVE PENALTY PROGRAM"

The Air Resources Board (the "Board" or "ARB") will conduct a public hearing at the time and place noted below to consider amendments to regulations found in section 60065 et seq. (Administrative Hearing Procedures for the Review of Complaints) and section 60075 et seq. (Administrative Hearing Procedures for the Review of Citations) of title 17, California Code of Regulations (CCR). ARB staff is proposing modifications to these regulations to implement the relevant provisions of Senate Bill (SB) 527. SB 527 authorizes ARB to impose administrative penalties as an alternative to pursuing civil penalties through the courts ("Administrative Penalty Program").

DATE: December 12, 2002

TIME: 9:00 a.m.

PLACE: California Environmental Protection Agency
Air Resources Board
Central Valley Auditorium
1001 I Street
Sacramento, California 95814

This item will be considered at a two-day meeting of the Board, which will commence at 9:00 a.m., December 12, 2002, and may continue at 8:30 a.m., December 13, 2002. This item may not be considered until December 13, 2002. Please consult the agenda for the meeting, which will be available at least ten days before December 12, 2002, to determine the day on which this item will be considered.

This facility is accessible to persons with disabilities. If accommodation is needed, please contact ARB's Clerk of the Board by November 27, 2002 at (916) 322-5594 or TDD (916) 324-9531 or (800) 700-8326 for TDD calls from outside the Sacramento area to ensure accommodation.

INFORMATIVE DIGEST OF PROPOSED ACTION

Sections Affected: Proposed Amendment to title 17, CCR sections 60065.1 through 60065.45, and 60075.1 through 60075.45.

Background:

Most enforcement actions brought by the Air Resources Board (ARB) are resolved through negotiated settlements. In a negotiated settlement, the source is brought into compliance as quickly as possible and pays a monetary settlement in lieu of civil penalties. In those cases where ARB is unable to reach an acceptable settlement with a violator, the matter must be pursued in the courts. This process, while necessary, is both costly and cumbersome. In 1990, the Legislature authorized the ARB to adopt an administrative hearing process to adjudicate violations of the Heavy-Duty Vehicle Inspection Program (HDVIP) and assessment of administrative civil penalties (Health and Safety Code section 44011.6). That authority was expanded in 1995, with the adoption of chapter 1.5 of part 5 of division 26 of the Health and Safety Code, which provided the ARB with authority to establish, among other things, administrative procedures to assess and adjudicate civil penalties for violations of ARB fuel-related regulations. (See Health and Safety Code sections 43028 and 43031.)

Prior to the enactment of SB 527, all other provisions of division 26 of the Health and Safety Code within the ARB's purview could only be enforced judicially. In SB 527, the Legislature enacted Health and Safety Code sections 42410 and 43023. These sections expand ARB's authority to impose administrative civil penalties as an alternative to judicial civil penalties. SB 527 limits the amount that the ARB may assess as an administrative penalty to \$10,000 per violation per day with a maximum assessment not to exceed \$100,000. In no event may administrative penalties for a violation exceed the judicial civil penalty that could be assessed under the Health and Safety Code for that violation.

The legislation also specifically directs the ARB to use its existing administrative hearing regulations to implement the penalty assessment program. To this end, staff is proposing modifications to title 17, CCR section 60065.1 et seq. (Administrative Hearing Procedures for the Review of Complaints) and CCR section 60075.1 et seq. (Administrative Hearing Procedures for the Review of Citations) to address the specific directives of the legislation. In initially adopting administrative hearing procedures, the ARB established a two-tiered enforcement hearing process. This process provides for complaints to be issued for the more serious and complex violations – subject to higher penalty assessments – and citations to be issued for less serious, less complex, and more clear cut violations.

Staff's Proposal

Staff's proposal would broaden the existing administrative penalty assessment and hearing procedures to allow for the issuance of administrative citations and complaints for all violations covered by SB 527. The existing administrative penalty provisions that provide for the issuance of citations and fuel-related complaints would remain unchanged. Because of the different maximum penalties that may be assessed for fuel violations and those violations covered under SB 527, the amendments would

separately set forth the ARB's authority to assess penalties for violations covered by SB 527.

In response to other directives of SB 527, the staff has proposed the following modifications to title 17, CCR section 60065.1 et seq. and CCR section 60075.1 et seq.:

- Clarify that an administrative civil penalty would be issued as an alternative to a judicial civil penalty and not be cumulative;
- Make clear that ARB's administrative penalty authority only extends to those categories of violations for which it maintains authority to impose judicial civil penalties;
- Clarify that an administrative law judge appointed by the Department of General Services, State Office of Administrative Hearings (OAH) would conduct all hearings authorized by Health and Safety Code section 42410 and section 43023;
- Amend both hearing procedure regulations to add civil penalty limits in accordance with SB 527; and
- Amend the existing criteria used for assessing penalties for fuel violations to also apply to assessments for violations covered under Health and Safety Code section 43023 and adding a new provision establishing penalty assessment criteria for violations covered under Health and Safety Code section 42410;

Additionally, the staff is proposing to make other minor modifications to the hearing procedures for purposes of clarity and conformity with other state administrative hearing procedures.

Comparable Federal Regulations

Federal administrative hearing procedure regulations do exist, but they do not apply to matters heard under the proposed amendments to ARB's administrative hearing procedures.

AVAILABILITY OF DOCUMENTS AND CONTACT PERSON

The Board staff has prepared a ISOR for the Proposed Regulatory Action, which includes a summary of the environmental impacts if any, of the proposal.

Copies of the ISOR and the full text of the proposed regulatory language, in underline and strikeout format to allow for comparison with the existing regulations, may be accessed on the ARB's website listed below, or may be obtained from the Board's Public Information Office, 1001 I Street, Environmental Services Center, 1st Floor, Sacramento, California 95814, phone number (916) 322-2990, at least 45 days prior to the scheduled hearing (December 12, 2002).

Any substantive inquiries regarding this matter may be directed to the designated agency contact persons: Mr. Paul Jacobs, Chief, Mobile Source Enforcement Branch, (916) 322-7061 and Ms. Judy Lewis, Air Pollution Specialist at (916) 322-1879.

Further, the agency representative and designated back-up contact persons to whom procedural inquiries concerning the proposed administrative action may be directed are Artavia Edwards, Manager, Board Administration & Regulatory Coordination Unit, (916) 322-6070, or Alexa Malik, Regulations Coordinator, (916) 322-4011. The Board staff has compiled a record which includes all information upon which the proposal is based. This is available for inspection at the ARB during regular business hours upon request to the contact persons.

If you are a person with a disability and desire to obtain this document in an alternative format, please contact the Air Resources Board ADA Coordinator at (916) 323-4916, or TDD (916) 324-9531, or (800) 700-8326 for TDD calls from outside the Sacramento area.

This notice, the ISOR and all subsequent regulatory documents, including the Final Statement of Reasons for Rulemaking (FSOR) when completed, is or will be available on the ARB Internet site for this rulemaking at www.arb.ca.gov/regact/adminpen/adminpen.htm or www.arb.ca.gov/enf/admpenal/admpenal.htm.

COSTS TO PUBLIC AGENCIES AND TO BUSINESSES AND PERSONS AFFECTED

The determinations of the Board's Executive Officer concerning the costs or savings necessarily incurred in reasonable compliance with the proposed regulations are presented below.

The Executive Officer has determined that the proposed regulatory action will not create costs or savings, as defined in Government Code section 11346.5(a)(5) & (6), to any state agency or in federal funding to the state, costs or mandate to any local agency or school district whether or not reimbursable by the state pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code, or other non discretionary savings to state or local agencies.

The Executive Officer has also made an initial determination that adoption of the proposed regulatory action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

In developing this regulatory proposal, the ARB staff evaluated potential economic impacts on representative private persons or businesses. The Executive Officer is not aware, pursuant to Government Code section 11346.5(a)(9), of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed actions.

In accordance with Government Code section 11346.3 the Executive Officer has determined that the proposed regulatory action will not affect the creation or elimination of jobs within the State of California, the creation of new businesses or elimination of existing businesses within California, or the expansion of businesses currently doing business within California. An assessment of the economic impacts of the proposed regulatory action can be found in the ISOR.

The Executive Officer has also determined, pursuant to title 1, CCR, section 4, that the proposed regulatory action will affect small businesses.

Before taking final action on the proposed regulatory action, the ARB must determine that no reasonable alternative considered by the ARB or that has otherwise been identified and brought to the attention of the ARB would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons or businesses than the proposed action.

SUBMITTAL OF COMMENTS

The public may present comments relating to this matter orally or in writing. To be considered by the Board, written submissions must be addressed to and received by the Clerk of the Board **no later than 12:00 noon, December 11, 2002** and addressed to the following:

Clerk of the Board
Air Resources Board
1001 "I" Street, 23rd Floor
Sacramento, CA 95814

Electronic mail is to be sent to: adminpen@listserv.arb.ca.gov and received at the ARB **no later than 12:00 noon December 11, 2002** or received by the Clerk of the Board at the hearing.

Facsimile submissions are to be transmitted to the Clerk of the Board at (916) 322-3928 and received at the ARB **no later than 12:00 noon, December 11, 2002.**

The Board requests but does not require that 30 copies of any written statement be submitted and that all written statements are filed at least 10 days prior to the hearing so that ARB staff and Board Members have time to fully consider each comment. The Board encourages members of the public to bring to the attention of staff in advance of the hearing any suggestions for modification of the proposed regulatory action.

STATUTORY AUTHORITY

This regulatory action is proposed under that authority granted in sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), of the Health and Safety Code.

This action is proposed to implement, interpret and make specific relevant provisions of Senate Bill 527 (Sher; Stats, 2001, Chaptered 769) codified at sections 39010, 39514, 39600, 39601, 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43102, 43106, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), 43154, 43201, 43211, 43212, and 44011.6 of the Health and Safety Code and Government Code sections 6250 et seq., 11500, 11181, 11182, 11184–11188, 11189, 11191, 11340.1–11340.5, 11415.60, 11425.30, 11425.40, 11430.70–11430.80, 11435.25, 11435.30, 11435.55, 11440.30, 11440.50, 11450.05–11450.30, 11455, 11455.30, 11505.3, 11507.6, 11507.7, 11509, 11511, 11512, and 11525. Code of Civil Procedure sections 1013, 1013(a), 1094.5, 1985–1985.4, 1987, and 1988, 13 CCR, sections 2048 and 60075.1, title 17 CCR, sections 60065.9, 60075.1, and 91000 et seq., and *Mathews v. Eldridge*, 424 U.S. 319 (1976).

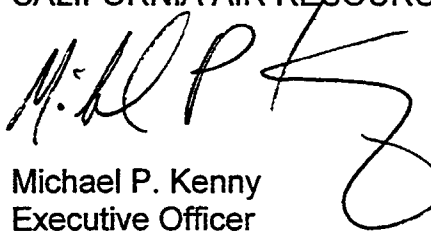
HEARING PROCEDURES

The public hearing will be conducted in accordance with the California Administrative Procedure Act, title 2, division 3, part 1, chapter 3.5 (commencing with section 11340) of the Government Code.

Following the public hearing, the Board may adopt the regulatory language as originally proposed, or with non-substantial or grammatical modifications. The Board may also adopt the proposed regulatory language with other modifications if the text as modified is sufficiently related to the originally proposed text that the public was adequately placed on notice that the regulatory language as modified could result from the proposed regulatory action; in such event the regulatory text, with the modifications clearly indicated, will be made available to the public, for written comment, at least 15 days before it is adopted.

The public may request a copy of the modified regulatory text from the Board's Public Information Office, Air Resources Board, 1001 I Street, Environmental Services Center, 1st Floor, Public Information Office, Sacramento, CA 95814, (916) 322-2990.

CALIFORNIA AIR RESOURCES BOARD


Michael P. Kenny
Executive Officer

Date: October 15, 2002

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website at www.arb.ca.gov.

**CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
AIR RESOURCES BOARD**



ENFORCEMENT DIVISION

**STAFF REPORT: INITIAL STATEMENT OF REASONS FOR
PROPOSED RULEMAKING**

**PUBLIC HEARING TO CONSIDER AMENDMENTS TO REGULATIONS DEFINING
PROCEDURES FOR ADMINISTRATIVE HEARINGS FOR CITATIONS AND
COMPLAINTS**

Date of Release: October 24, 2002

Hearing Date: December 12, 2002

Prepared By

Stationary Source Enforcement Branch

ACKNOWLEDGEMENTS

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This report has been reviewed by the staff of the California Air Resources Board and approved for publication. Approval does not signify that the contents necessarily reflect the views and policies of the Air Resources Board, nor does mention of trade names or commercial products constitute endorsement or recommendation for use. To obtain this document in an alternative format, please contact the Air Resources Board ADA Coordinator at (916) 322-4505, TDD (916) 324-9531, or (800) 700-8326 for TDD calls from outside the Sacramento area. This report is available for viewing or downloading from the Air Resources Board's Internet site; <http://www.arb.ca.gov/enf/enf/htm>.

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Proposed Amended California Code of Regulation §60065.1 et seq.

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Senate Bill 527

State of California
AIR RESOURCES BOARD

Staff Report: Initial Statement
Of Reasons for Proposed
Rulemaking

ADMINISTRATIVE CIVIL PENALTY PROGRAM - PUBLIC HEARING TO CONSIDER
AMENDMENTS TO THE PROCEDURES FOR ADMINISTRATIVE HEARINGS FOR
CITATIONS AND COMPLAINTS

Date of Release: October 24, 2002
Scheduled for Consideration: December 12, 2002
Agenda Item No.:

I. INTRODUCTION

A. Purpose

Staff proposes to modify existing Administrative Hearing Procedures to conform with directives of Senate Bill (SB) 527 (Stats. 2001, c. 769 (SB 527) §§3 and 18, codified at §42410 and §43023 of the Health and Safety Code (HSC).) SB 527 provides that, as an alternate to seeking judicial civil penalties, the ARB may impose administrative civil penalties for violations of all ARB adopted rules and regulations under parts 1 through 4, division 26 of the HSC and most air pollution violations under part 5, division 26 of the HSC.

This report comprises the Staff Report: Initial Statement of Reasons for Rulemaking for Public Hearing (Staff Report) to consider "*Administrative Civil Penalties*" as required by the Administrative Procedure Act (Government Code §11340 et seq.).

B. Executive Summary

Most enforcement actions brought by the Air Resources Board (ARB) are resolved through negotiated settlements. In a negotiated settlement, the source is brought into compliance as quickly as possible and pays a monetary settlement in lieu of civil penalties. In those cases where ARB is unable to reach an acceptable settlement with a violator, the matter must be pursued in the courts. This process, while necessary, is both costly and cumbersome. In 1990, the Legislature authorized the ARB to adopt an administrative hearing process to adjudicate violations of the Heavy-Duty Vehicle Inspection Program (HDVIP) and assessment of administrative civil penalties. (Health

and Safety Code section 44011.6.) That authority was expanded in 1995, with the adoption of chapter 1.5 of part 5 of division 26 of the Health and Safety Code, which provided the ARB with authority to establish, among other things, administrative procedures to assess and adjudicate civil penalties for violations of ARB fuel-related regulations. (See Health and Safety Code sections 43028 and 43031.)

Prior to the enactment of SB 527, all other provisions of division 26 of the Health and Safety Code within the ARB's purview could only be enforced judicially. In SB 527, the Legislature enacted HSC §§42410 and 43023. These sections expand ARB's authority to impose administrative civil penalties as an alternative to judicial civil penalties. SB 527 limits the amount that the ARB may assess as an administrative penalty to \$10,000 per violation per day, with a maximum assessment not to exceed \$100,000. In no event, may administrative penalties for a violation exceed the judicial civil penalty that could be assessed under the HSC for that violation.

The legislation also specifically directs the ARB to use its existing administrative hearing regulations to implement the penalty assessment program. To this end, staff is proposing modifications to title 17, CCR §60065.1 et seq. (Administrative Hearing Procedures for the Review of Complaints) and CCR §60075.1 et seq. (Administrative Hearing Procedures for the Review of Citations) to address the specific directives of the legislation. In initially adopting administrative hearing procedures, the ARB established a three-tiered enforcement process. The most serious and complex cases would continue to be referred to judicial courts for enforcement. But for other violations, administrative penalties could be pursued. The administrative process provides that complaints may be issued for the more serious and complex of these remaining violations and citations issued for the least serious, clear-cut violations.

Staff's proposal would broaden the existing administrative penalty assessment and hearing procedures to allow for the issuance of administrative citations and complaints for all violations covered by SB 527. The existing administrative penalty provisions that provide for the issuance of citations and fuel-related complaints would remain unchanged. Because of the different maximum penalties that may be assessed for fuel-related violations and those violations covered under SB 527, the amendments would separately set forth the ARB's authority to assess penalties for violations covered by SB 527.

In response to other directives of SB 527, the staff has proposed the following modifications to title 17, CCR §60065.1 et seq. and CCR §60075.1 et seq.:

- Clarify that an administrative civil penalty would be issued as an alternative to a judicial civil penalty and not be cumulative;
- Make clear that ARB's administrative penalty authority only extends to those categories of violations for which it maintains authority to impose judicial civil penalties;

- Clarify that an administrative law judge appointed by the Department of General Services, State Office of Administrative Hearings (OAH) would conduct all hearings authorized by HSC §42410 and §43023;
- Amend both hearing procedure regulations to add civil penalty limits in accordance with SB 527; and
- Amend the existing criteria used for assessing penalties for fuel violations to also apply to assessments for violations covered under HSC §43023 and adding a new provision establishing penalty assessment criteria for violations covered under HSC §42410.

Additionally, the staff is proposing to make other minor modifications to the hearing procedures for purposes of clarity and conformity with other state administrative hearing procedures.

The proposed modifications would not adversely impact the environment or raise any environmental justice issues. The amendments also would not adversely affect California businesses or have any economic or fiscal impact on state and local governments.

II. GENERAL--BACKGROUND

A. Judicial Civil Penalty Provisions

Prior to 1990, the ARB had been authorized by the Legislature to redress violations of the Health and Safety Code and its rules and regulations in judicial court.¹ Actions for recovery of civil penalties had to be brought in a court of proper jurisdiction in the county where the violation occurred and be brought in the name of the People of the State of California by the Attorney General. (See HSC §§42403 and 43154.) Among the sources that were required to be prosecuted in a state judicial court for violating ARB adopted rules and regulations implementing provisions of parts 1 through 4 of the HSC were: manufacturers, distributors, and retailers of consumer products; owners of idling diesel-powered busses; cargo tank trucks required to be equipped with a certified vapor recovery system; and persons causing the release of toxic air contaminants. (See HSC §39674 and 42402 et seq.) Similarly, the ARB could only bring a state court action against sources that violated provisions of part 5 of division 26

¹In 1990, the Legislature provided the ARB with authority to adopt an administrative hearing process to adjudicate violations of the Heavy-Duty Vehicle Inspection Program (HDVIP) and assessment of administrative civil penalties. (Health and Safety Code section 44011.6.) That authority was expanded in 1995, with the adoption of chapter 1.5 of part 5 of division 26 of the Health and Safety Code, which allowed the ARB to establish, among other things, administrative procedures to assess and adjudicate civil penalties for violating the state's fuel-related regulations. (See Health and Safety Code sections 43028 and 43031.) As used in this report, "judicial penalties" are penalties enforced in judicial court and "administrative penalties" are penalties assessed and adjudicated before an administrative tribunal.

of the HSC, and the regulations and orders adopted by the ARB to implement the provisions thereof. Included among these sources are: manufacturers and retailers of new motor vehicles and engines; manufacturers, distributors, and retailers of off-road vehicles and equipment; used car dealerships; and manufacturers and owners of retrofit kits for bus fleets.

Under HSC §§39674 and 42402 et seq., a source violating an ARB adopted rule or regulation is subject to civil judicial penalties ranging between \$1,000 to \$50,000 per violation per day. There are no maximum caps as to total penalties that may be sought through the courts. A person in violation of the provisions under part 5, division 26 of the HSC are subject to judicial civil penalties ranging between \$50 to \$5,000 for each unit found to be in violation. Again, there are no maximum caps that may be sought through judicial enforcement. (See e.g. HSC §§43016, 43154, and 43211.)

B. History of ARB's Administrative Civil Penalty Program

Prior to the enactment of SB 527 in 2001, ARB was authorized to assess and enforce administrative penalties for violations in two discrete areas: the Heavy Duty Vehicle Inspection Program (HDVIP) and rules and regulations pertaining to fuel standards and requirements. In this section, we give an overview of the progression of ARB's administrative penalty program.

In 1991, pursuant to amendments to HSC section §44011.6 (stats.1990, c.1433 SB 1874), ARB adopted regulations establishing test procedures and protocols of enforcement and procedures for conducting administrative hearings for citations issued by the HDVIP pursuant to Health and Safety Code §44011.6. (See title 17, CCR, §§60075.1 et seq.) In accord with the directives of the Legislature, penalties for first time violations under the HDVIP were set at \$800 with \$500 waivable if repairs were completed and documented in a timely manner. Penalties for repeat violations within a year of the first were set at \$1800. (*Id.*) The hearing procedures set forth at title 17, CCR, §§60075.1 et seq. were adopted by ARB as a streamlined administrative hearing process to specifically address the anticipated high volume of cited HDVIP vehicles.

In 1995, the legislature expanded ARB's authority to assess administrative civil penalties as an alternative to judicially imposed penalties. (HSC §§43028 and 43031(a), stats. 1995, c. 966 (SB 163), §3.) Under this grant of authority and after finding the administrative hearing process to be an efficient, expeditious, and, in general, better suited process for adjudicating certain types of violations, the ARB adopted title 17, CCR §§60065.1 et seq., establishing administrative hearing procedures for the review of complaints, and amended title 17, CCR §60075.1 et seq. to expand the use of citations.

In so doing, ARB adopted a three-tiered enforcement process. The most serious and complex fuel-related violations would still be handled through the courts. The Executive Officer was provided with discretion, however, to refer other fuel-related cases to the

administrative hearing process. The more serious and complex of these cases are subject to penalties up to \$25,000 per day per violation, with a maximum total penalty assessment as high as \$300,000. These violations are subject to issuance of a complaint and adjudicated under the provisions of §§60065.1 et seq. if the Executive Officer so determines. These procedures are somewhat more formal than the procedures set forth at §§60075.1 et seq. and assure parties subject to potentially greater penalty amounts a full and fair hearing on all contested issues. The procedures at title 17, CCR, §§60075.1 et seq., were amended to incorporate the least serious and readily discernable fuels-related violations. These violations were classified, along with HDVIP violations, as Class I violations, and are typically enforced by issuing field citations. Fuels-related citations are not subject to penalties of more than \$5,000 per violation per day, with total penalty assessments not to exceed \$15,000.

At that time, staff also amended the hearing procedures to incorporate provisions of the recently amended Administrative Procedures Act, Government Code §§11400 et seq. (Stats. 1995 c.938 (SB 523).) Further amendments clarified and made more specific the rights and responsibilities of the parties to the hearing, the hearing office, and the adjudicating hearing officers.

III. SB 527 BROADENS ARB'S AUTHORITY TO ASSESS ADMINISTRATIVE CIVIL PENALTIES

A. Introduction

In 2001, the Legislature adopted SB 527 to enact HSC §42410 and §43023. Those sections broadly authorize ARB to impose administrative civil penalties as an alternative to judicial civil penalties for all ARB adopted rules and regulations under parts 1 through 4, division 26 of the HSC and most air pollution violations under part 5, division 26 of the HSC. SB 527 provides that the administrative assessments are to be the lesser of the judicial penalty amount authorized by the HSC for the violation in question or \$10,000 per day per violation, with total penalty assessments not to exceed \$100,000.

SB 527 specifically directs ARB staff to use ARB's existing administrative hearing regulations to implement the program. To this end, staff is proposing modifications to title 17, CCR §§60065.1 et seq. (Administrative Hearing Procedures for the Review of Complaints) and CCR §§60075.1 et seq. (Administrative Hearing Procedures for the Review of Citations) to incorporate the directives of the legislation.

As stated, SB 527 provides an alternative means to enforce specific provisions of the HSC and ARB adopted rules and regulations. The intent of the legislation is to allow the ARB flexibility to pursue administrative penalties and adjudicate those violations that are less severe and complex and that involve smaller penalties. For stakeholders, the main difference between a civil judicial penalty and a civil administrative penalty is process. Under both types of assessments, the ARB will continue to resolve violations wherever possible, through negotiated settlements. In contrast to the administrative

hearing process, the judicial process is typically more formal, requiring, in most cases, representation by counsel, lengthy pretrial procedures, and delay because of crowded court dockets. The administrative hearing process found in title 17, CCR §§60065.1 et seq. and CCR §§60075.1 et seq. affords a person who has received a complaint or citation an avenue to have the merits of the citation or complaint expeditiously reviewed by an administrative law judge in a full and fair hearing.

B. Summary of Legislation

This summary addresses only sections 3 and 18 of SB 527 that pertain to the ARB's Administrative Penalty Program.³

1. Intent of Legislation

The state legislative intent of SB 527 is to:

- Provide ARB with an alternative to pursuing civil penalties through the court system by allowing the ARB to pursue penalties for less significant violations through an administrative hearing process;
- Provide administrative penalty authority only for those categories of violations for which the state board maintains the authority to impose civil penalties; and
- Ensure that the level of penalty impositions do not exceed historic levels.

2. Provisions of the Bill

SB 527 adds sections 42410 and 43023 to the Health and Safety Code. Those sections provide that:

- ARB may impose, as an alternative to judicially enforced penalties, administrative penalties for less significant violations of ARB rules and regulations under parts 1 through 4, division 26 of the HSC and most violations covered under part 5, division 26 of the HSC.
- Administrative penalty assessments shall be the lesser of the judicial civil penalty that can be imposed under the HSC for the violation in question, or \$10,000 per violation per day, up to a maximum assessment not to exceed \$100,000.
- Administrative penalties shall be imposed as an alternative to, and not in addition to, a judicially enforced penalty.
- ARB may not seek administrative penalties for any category of violations for which it

³ SB 527's other provisions pertain to greenhouse gases and the California Climate Action Registry that are not applicable to this rulemaking item.

does not have authority to recover penalties in a judicial civil action.

- ARB may not assess administrative penalties for any category of violation that wasn't subject to enforcement by the ARB as of January 1, 2002.
- If the ARB imposes an administrative penalty pursuant to SB 527, it may not bring any action pursuant to the Business and Professions Code, section 17000 et seq.
- If a violation is within the enforcement jurisdiction of both the ARB and a local air district, the ARB may not impose an administrative penalty if the air district has already commenced an enforcement action.
- When imposing an administrative penalty, ARB shall take into consideration all relevant circumstances surrounding the violation including, but not limited to, HSC 42403 for violations covered under HSC 42410, and HSC 43031 for violations covered under HSC §43023.
- Administrative review shall be conducted under the administrative hearing regulations located in title 17, California Code of Regulations (CCR) sections 60065.1 et seq. and 60075.1, except that an administrative law judge appointed by the Office of Administrative Hearings shall conduct the hearings.
- Parties are entitled to judicial review by filing of a writ of mandate in accordance with section 1094.5 of the Code of Civil Procedure.
- The ARB may apply to the superior court to enforce a judgment in the amount of the administrative penalty.
- By January 1, 2005, the ARB shall prepare a report to the Legislature and the Governor summarizing the administrative penalties imposed by the ARB for calendar years 2002, 2003, 2004, and 2005. (There appears to be a typographical error in the statute, as penalty data for calendar year 2005 cannot be collected by January 1, 2005.)

IV. SUMMARY OF SUBSTANTIVE AMENDMENTS TO EXISTING ADMINISTRATIVE HEARING PROCEDURES

- A. Proposed Amendments to title 17, CCR §§ 60065.1 et seq., Administrative Hearing Procedures for Review of Complaints. (The full text of the proposed amendments are attached to this Staff Report as Attachment A.

§60065.1 Applicability

Pursuant to the express authority granted by the Legislature in SB 527, the staff proposes to modify §60065.1(a) by adding language to indicate that an administrative complaint can be issued pursuant to HSC §§42410 and 43023. Section 42410 provides that the ARB may assess and adjudicate administratively, penalties for violations of its rules and regulations adopted under authority granted in parts 1 through 4, of division 26 of the HSC. Section 43023 provides that the ARB may assess and adjudicate administratively penalties for violations arising under chapters 1 through 4 and chapter 6 of part 5, division 26 of the HSC, and rules and regulations adopted by the ARB to implement those statutes. These hearing procedures were first adopted by the ARB in 1998 to implement previously granted authority to assess and adjudicate administrative complaints for violations of ARB adopted fuel regulations and standards. These hearing procedures would continue to apply to those types of violations.

The staff is proposing that the hearing procedures be broadened to include violations under HSC §§42410 and 43023 having found that administrative assessments and adjudication for less complex and serious violations afford more efficient and expeditious process for all parties, and allows the ARB to better utilize its enforcement resources. It follows that improved enforcement will result in greater compliance with air quality laws.

§60065.2(a) - Definitions

Staff proposes to delete reference to title 13, CCR, Chapter 5, Standards for Motor Vehicle Fuels, §2250 et seq., and Chapter 8, Clean Fuels Program, §2300, et seq. These sections are being deleted as staff has determined that it is unnecessary to reference these definitions in the administrative hearing procedures. A hearing officer will be able to take judicial notice of these provisions, which reference the ARB fuel standards and specification regulations, as well as any other provisions of the HSC or the adopted rules and regulations of the ARB, in any case involving violations of those provisions that are brought before the administrative tribunal.

§60065.2(b)(3) - Definition of Complaint

Staff is proposing modifications to this section to make it clear that a complaint cannot be issued for a Class I violation, which is covered by the administrative hearing procedures set forth in title 17, CCR, §§60075.1 et seq. Staff is also proposing, consistent with SB 527, to make it clear that a complaint in these proceedings is for administrative penalties that are an alternative to judicially enforced penalties.

§60065.2(b)(10) - Definition of Hearing Officer

Staff has added language that clarifies that the hearing officer is “either” an administrative law judge (ALJ) appointed by ARB to conduct hearings pursuant to HSC

§43028 (fuels requirements and standards) or “an administrative law judge within the Department of General Services, State Office of Administrative Hearings (OAH) who shall be appointed to conduct hearings pursuant to Health and Safety Code sections 42410 and 43023.” This modification conforms the hearing procedures to the directives of SB 527 that administrative law judges from OAH adjudicate all matters issued pursuant to the provisions of the legislation.

§60065.2(b)(15) - Definition - Response/Request for Hearing

Staff is proposing to modify the title of this definition to more accurately reflect that when responding to the complaint, the respondent is effectively requesting a hearing before an administrative law judge.

§60065.13(c) Prohibited Communications

The phrase “petition for review of executive officer decision” was inadvertently placed in the existing procedures and staff is proposing that the reference be deleted throughout the regulation. In this particular section, staff is proposing that the phrase be replaced with the word “complaint”.

§60065.16 Violations Subject to a Complaint; Issuance

The staff is proposing that §60065.16(a) be amended to include the ARB’s new authority to issue complaints assessing administrative penalties pursuant to the Legislature’s delegation in HSC §§42410 and 43023. The language of title 17, CCR, §60065(a)(1) is written broadly to cover both complaints seeking administrative penalties issued under HSC §43023 and §43028, which authorizes the ARB to assess penalties for fuel-related violations and under which the provisions of §60065.1 et seq. were initially adopted in 1998. The reference in existing §60065.16(a)(2) - that a complaint cannot be issued for violations that are determined to be a Class I violation subject to a citation issued under title 17, CCR, §§60075.1 - has been moved to §60065.16(d)(2).

Former §60065.16(a)(3) has been reformatted to be §60065(b). Although amended for purposes of clarification, the substance of the modified paragraph remains basically unchanged, i.e., complaints seeking penalties pursuant to HSC §43028 for violations ARB fuel requirements and standards shall not exceed \$25,000 per violation for each day of violation and shall not exceed a total penalty of \$300,000. SB 525 specifically stated that its provisions do not apply Chapter 1.5 (commencing with §43025). (See §43023(h).)

A new §60065.16(c) has been added to authorize issuing complaints assessing penalties pursuant to §§42410 and 43023. Pursuant to the directives of SB 527, paragraph (c) would authorize the ARB to assess penalties not to exceed the lesser of the maximum amount allowed by statute for the violation, or \$10,000 per violation per

day of violation with a total penalty assessment not to exceed \$100,000. In determining the amount allowed by statute, the ARB would be required to use the method of calculation set forth in the underlying statute (e.g., HSC §43016 states that penalties shall be assessed on a per vehicle basis).

§60065(d) has been added to make clear that the ARB would not be allowed to issue complaints under two specific circumstances. Paragraph (d)(1) provides, pursuant to the directives of SB 527, that ARB would not be allowed to issue an enforcement complaint in those circumstances in which the ARB and a district share concurrent enforcement authority over a violation and the district has commenced an enforcement action. As previously stated, paragraph (d)(2) is carried over from the existing regulation and sets forth an administrative determination by the ARB that it would not issue complaints for violations determined to be Class I violations, as defined in §§60075.2(b)(5) and 60075.11.

Former §60065(b) has been moved to paragraph (e). Except for subparagraphs (e)(5) and (7), the substance of the language remains the same. Subparagraphs (e)(5) and (7) would be modified to be consistent with the earlier described definition change in §60065.2(b)(15). The change would make it clear that a party's response to a complaint is an effective request for hearing.

Proposed §60065.16(f) would require the ARB to file a copy of the complaint with the appropriate administrative hearing office as well as serving the original copy on the respondent. This modification would provide notice to the respective administrative hearing offices that an action has been lodged, which should facilitate case management.

§60065.18 Response to Complaint by Respondent

For reasons of clarity and consistency, staff is proposing that the title of this section and references in the text to "response to complaint" be modified to reflect that a response is also a request for hearing. (See definition change at §60065.2(b)(15).) Staff is also recommending that paragraph (a) be further amended, consistent with §60065.3, to clarify that a party may use a representative who may or may not be a legal counsel. Also the section would be amended to make it clear that a response/request for hearing be filed with the administrative hearing office designated in the complaint. This change is required because cases will be referred to different hearing offices.

§60065.19 Issues for Hearing

This language is meant to clarify that if a complaint is issued for a repeat violation, the only relevant issues in the instant hearing are those that pertain to the present violation. The amendment would make it clear that a party could not contest the merits of a previously issued complaint that was itself not timely contested.

§60065.21 – Scheduling of Hearings

Staff is proposing a new paragraph (a) that pertains to scheduling of hearings and assignment of hearing officers for complaints issued pursuant to the new authority granted under HSC §§42410 and 43023.

Proposed paragraph (b) would be amended to clarify that complaints issued pursuant to HSC §43028 would continue, in the first instance, to be assigned to a hearing officer of the state board. As stated previously, the provisions of SB 527 did not supercede the authority previously granted in §§43028 and 43031. To ensure expeditious enforcement of cases, staff proposes that paragraph (c) be amended to require a hearing office to schedule a complaint for hearing within 45 days from the date of issuance in those cases in which no response/request for hearing has been filed. Staff further recommends that superfluous language in paragraph (c) be deleted for clarity.

§60065.25 – Settlement Agreements and Consent Orders

Staff proposes to delete the phrase “by agreeing upon a civil penalty, with or without conditions or other appropriate remedy” finding the language to be superfluous and unnecessary.

Staff is proposing that language be added to paragraph (b) to allow OAH to allow administrative law judges from the ARB to assist in settlement discussions. This would allow persons with expertise and experience in air pollution law to assist OAH in settling cases.

Consistent with earlier mentioned modifications, existing paragraph (e) would be deleted in that it applies only to petition for review hearings. As stated, this language was inadvertently included in the existing procedures when initially adopted.

§60065.38 – Default Order

Staff is proposing that the time for filing a request for reinstatement be reduced from 30 days to 10 days. The staff believes that the initially provided period is too long and causes unnecessary delay in decisions becoming final and affected sources coming into compliance with the law. It is believed that 10 days for a party to take action after receiving written notice of the default is reasonable. The proposed change is consistent with or less stringent than other state administrative hearing procedures. (See e.g., Administrative Procedure Act, Government Code §11520(c) [a party has 7 days in which to file motion to request that default order be vacated]; “Rules of Practice and Procedure of the Occupational Safety and Health Appeals Board,” title 8, CCR, §383(b) [10 days for filing motion to request reinstatement after dismissal for failure to appear].

§60065.40 – Penalty Assessment Criteria

Consistent with the Legislature's directives in HSC §42410(f) that the criteria of HSC §42403 be considered when determining penalty assessments for violations issued under HSC §42410, staff is proposing a new paragraph (a), which sets forth the criteria of §42403. Again, consistent with the directives of the Legislature in HSC §43023(f), staff is proposing that proposed paragraph (b) be amended to reflect that the penalty assessment criteria of HSC §43031 be used for penalty assessments issued pursuant to HSC §43023 as well as §43028. ARB staff is also proposing to add an additional factor to both paragraphs (a) and (b) that would require a hearing officer to consider penalties or range of penalties established by the ARB in its rules or regulations that underlie the violation. The staff believes that for reasons that are self-evident that this factor should be considered among others.

- B. Proposed Amendments to title 17, California Code of Regulations, §60075 – Administrative Hearing Procedures for Review of Citations. (The full text of the proposed amendments are attached to the Staff Report as Attachment B).*

§ 60075.1 Applicability

Pursuant to the express authority granted by the Legislature in SB 527, the staff proposes to modify §60075.1(a) by adding language to indicate that an administrative citation can be issued pursuant to HSC §§42410 and 43023. Section 42410 provides that the ARB may assess and adjudicate administratively, penalties for violations of its rules and regulations adopted under authority granted in parts 1 through 4, division 26 of the HSC. Section 43023 provides that the ARB may assess and adjudicate administratively penalties for violations arising under chapters 1 through 4 and chapter 6 of part 5, Division 26 of the HSC and rules and regulations adopted by the ARB to implement those statutes.

The staff is proposing that the hearing procedures be broadened to include violations under HSC §§42410 and 43023 having found that administrative assessments and adjudication for less complex and serious violations afford more efficient and expeditious process for all parties, and allows the ARB to better utilize its enforcement resources. It follows that improved enforcement will result in greater compliance with air quality laws.

§60075.2 – Definitions

Staff proposes to delete reference to title 13, CCR, Chapter 5, Standards for Motor Vehicle Fuels, §2250 et seq., and Chapter 8, Clean Fuels Program, §2300, et seq. These sections are being deleted as staff has determined that it is unnecessary to reference these definitions in the administrative hearing procedures. A hearing officer will be able to take judicial notice of these provisions, which reference the ARB fuel

standards and specification regulations, as well as any other provisions of the HSC or the adopted rules and regulations of the ARB, in any case involving violations of those provisions that are brought before the administrative tribunal.

§60075.2(b)(4) – New Definition – Citing Party

Staff has proposed to add this new definition. Finding that the term “citing party” more accurately identifies the moving party in a citation proceeding, the staff proposes that the term replace “complainant” (existing paragraph (b)(5) of these definitions). This change will be reflected throughout the regulation.

Existing §60075.2(b)(5) – Definition – Complainant

As discussed above in section 60075.2(b)(4), this term is being replaced by “citing party” throughout this regulation.

§60075.2(b)(7) – New Definition - Days

The staff proposes the addition of this definition to clarify that “days” means calendar days.

§60075.2(b)(10) - New Definition – Executive Officer

Staff proposes to add this new definition to clarify that “Executive Officer” means the executive officer of the ARB.

§60075.2(b)(11) – Definition - Hearing Office

The staff is proposing that this definition be amended to include the Office of Administrative Hearings (OAH). This modification would conform these regulations to the directives of SB 527 that violations arising under HSC §§42410 and 43023 be referred to that state office.

§60075.2(b)(12) – Definition – Hearing Officer

Staff proposes to amend definitions in CCR §60075.2(b)(12) to specify that in administrative hearings held pursuant to HSC §42410 and §43023, the Hearing Officer shall be an administrative law judge appointed by OAH. As state, this amendment would conform these regulations to the directives of SB 527.

§60075.2(14) - Definition - Penalty

For purposes of clarity – to distinguish judicially enforced penalties from administratively enforced penalties - staff proposes to replace the words “the civil” with “an administrative” in describing penalties in these procedures.

§60075.4 - Service, Notice and Posting

Pursuant to SB 527, administrative hearings arising under HSC §§42410 and 43023 are to be conducted by the hearing office of the State Office of Administrative Hearings. Therefore, to facilitate administrative processing of citations and requests for hearings, staff proposes to amend §60075.4(b) to provide that if the designated hearing office is the State Office of Administrative Hearings, an original of every pleading, letter, document or other writing served in a proceeding under these rules shall be filed with that hearing office and also the ARB. This amendment would provide both OAH and the ARB with timely access to documents and better management of cases.

§60075.11 - Determination of Class I Violations

For purposes of clarity staff proposes that this section be reorganized to delineate the new authority to assess administrative penalties granted under SB 527. The basic definition and criteria for determination of "Class I" violations remains unchanged. The term would still cover all violations occurring under the HDVIP and those violations determined by the executive officer to be of a "nature that is clear cut and less complex and serious, in terms of size, scope, and harm to the public and environment".

The staff is proposing that §60075.11(b) be modified to so that it pertains to paragraph (a)(2) and (3) of §60075.11, both violations occurring under HSC §§43023 and 43028. The staff proposes that the section further make clear that the Executive Officer would be required to consider the penalty criteria set forth by the Legislature when he or she assesses penalties and determining whether circumstances involve a Class I violation.

As required by SB 527, staff is proposing that §60075.11(c) be amended to clarify that an administrative penalty may not exceed the maximum penalty allowed under the HSC for the same violation. Additionally, for purposes of clarity, the staff is proposing that in determining the maximum penalty allowed under the statute, the executive officer would be directed to use the same method as used under the statute (e.g. HSC §43016 assesses penalties on a per vehicle basis).

To conform the regulations to the directives of SB 527, the staff is proposing a new paragraph (d). That section would provide that if a local air pollution control district shares concurrent enforcement authority with the ARB and the district has commenced an enforcement action for a violation, the state board would not issue a citation for that violation.

§60075.12 - Issuance and Service of Citations

Staff is proposing clarifications to §60075.12(b)(7) to better identify the information that would be required to be included in the citation. Staff also recommends that a new paragraph (b)(8) be added to §60075.12 specifying the requirements for service of a

citation on a citee.

§60075.17 - Filing a Request for Hearing

The staff is proposing a new paragraph (b), which clarifies that a request for hearing to contest a citation be filed with the Executive Officer of the Air Resources Board.

Since citations would now be required to be filed with the Executive Officer and not a hearing office, staff proposes that term "hearing office" be replaced with "executive officer" in paragraphs (e) and "hearing office" in paragraphs (f) through (i). The staff is proposing this new process because of the directives of SB 527 that some violations be heard by OAH. Other violations will continue to be heard by the administrative hearing office at the state board. For ease of administration, the regulation would require that all citations in the first instance, be filed with the Executive Officer who will then refer the cases to the appropriate hearing office.

Finally, staff is proposing that paragraph (i) be amended to indicate that either the "executive officer or the " hearing officer assigned to the case " may allow the citee to amend the request for hearing after the deadline for filing has passed". Again, this change is being made to conform to the change in process and for reasons of administrative fairness.

§60075.19 – Issues for Hearing

The staff is proposing that §60075.19(b) be modified to delete the phrase "pursuant to §2185, title 13, California Code of Regulations". The reason for the change is that the provisions of the section would be applicable adoption of these amendments to a wider spectrum of violations and not just the deleted section.

§60075.20 – Stays Pending Filing a Request for Hearing

Staff proposes amendments to this section for reasons of clarity.

§60075.21 – Response by Citing Party

Staff proposes that §60075.21 be modified to be consistent with previously described proposed amendments regarding, among other things, the change in process proposed under §60075.17. (See above discussion.)

§60075.22 - Withdrawal of Request for Hearing

Staff is proposing amendments to paragraph (b) for purposes of clarity.

§60075.24 – Settlement Agreements and Consent Orders

Staff proposes to delete from paragraph (a) the phrase “by agreeing upon a civil penalty, with or without conditions or other appropriate remedy” finding the language to be superfluous and unnecessary. The staff is also proposing that a sentence be added to paragraph (b) that would allow OAH to use administrative law judges from the administrative hearing office at the ARB to assist in settlement discussions. Staff believes that it might be beneficial to use hearing officers with expertise and experience in the area of air pollution law to assist OAH hearing officers in such discussions.

§60075.30(a) -Time and Place of Hearings

Staff has proposed modifications to indicate that there are now two hearing offices that may review the issuance of citations.

§60075.38 – Default Order

Staff is proposing minor changes to paragraph (a) for purposes of clarity.

Staff further proposes that the phrase “in a complaint proceeding” be deleted from paragraph (b). The phrase was inadvertently included in this regulation when amended in 1998. Finally, staff is proposing to delete the phrase “Except as provided in §60075.17(e)” from paragraph (c). Staff has determined that the failure to file a request for hearing to review a citation, which is addressed in existing §60075.17(e) [proposed §60075(f)] is not a default issued by a hearing officer. Eliminating the phrase from this section would provide clarity and avoid confusion.

Amendments of paragraph (d) are being proposed for clarity. Also, staff is proposing that the time for filing a request for reinstatement be reduced from 30 days to 10 days. The staff believes that the initially provided period is too long and causes unnecessary delay in decisions becoming final and compliance achieved. It is believed that 10 days is a sufficient time period for a party to take action after receiving written notice of the default. The change is consistent with or less stringent than other administrative hearing processes. (See e.g., Administrative Procedure Act, Government Code §11520 [7 days in which to file motion to request that default order be vacated]; “Rules of Practice and Procedure of the Occupational Safety and Health Appeals Board,” title 8, CCR, §383(b) [10 days for filing motion to request reinstatement after dismissal for failure to appear].

§60075.39 - Penalty Assessment Criteria

As required by SB 527, staff proposes to amend paragraph (b) so that the penalty criteria set forth in HSC §43031 is used to determine penalty amounts for citations issued under HSC §43023 in addition to §43028. ARB staff is also proposing to add an additional factor that would require a hearing officer to consider penalties or range of

penalties established by the ARB in its rules or regulations that underlie the violation. The staff believes that for reasons that are self-evident, this factor should be considered among others. In accord with similar directives of SB 527, staff proposes to add a new paragraph (c) which would set forth the penalty assessment criteria of HSC §42403 for citations issued under HS&C §42410. The staff further proposes similar changes to paragraph (b) to include an additional factor that would require the Executive Officer to also consider penalties or range of penalties established by the ARB in its rules or regulations that underlie the violation.

§60075.45– Judicial Review

Consistent with SB 527 and the discussion of previous amendments, above, staff proposes to add references to HSC §§42410 and 43023 in paragraph (a)(2).

V. IMPACT ON THE ENVIRONMENT, BUSINESS AND ECONOMY OF THE STATE

A. Environmental Impact

ARB staff has determined that the proposed amendments would impose no adverse environmental impacts. SB 527 provides an alternate avenue for enforcing provisions of the Health and Safety Code and rules and regulations of the ARB through assessment of administrative penalties.

The proposed amendments do not alter or relax existing ARB rules and regulations but, as stated, provides an alternative means for enforcement. The amendments are expected to provide the ARB with greater flexibility in selecting the appropriate forum for enforcement and allow the ARB to better utilize its enforcement resources. For less complex and serious violations involving less significant penalties, administrative hearings provide a more efficient and expeditious process than judicial court, while affording fair hearings and due process for all parties. A more efficient enforcement and administrative process is expected to improve environmental compliance, with consequential benefits to the health and welfare of the state.

B. Environmental Justice Issues

Having identified that the proposed regulations will not result in any adverse environmental impacts, this proposal would not adversely impact any community in the State, especially low-income or minority communities.

C. Impact on Businesses and Individuals

It has been determined that this rulemaking would not cause any adverse economic impact on businesses or small businesses and would not affect the ability of California businesses to compete with businesses in other states. As stated above, the proposed

amendments do not substantively change existing enforcement authority but rather provides an alternative process for enforcing air quality laws. By providing a less formal, more expeditious process for resolving compliance disputes, the proposed procedures are expected to be of benefit to affected businesses and individuals as well as the ARB. More effective enforcement will benefit the great majority of businesses who comply with the law and who are adversely affected by those few businesses that attempt to gain an economic advantage through noncompliance.

Parties who elect to have matters heard under the proposed amended procedures may incur attorney fees for representation, which may run \$200.00 or more per hour if an attorney is used. However, while attorneys are typically used in judicial hearings, the proposed amended administrative hearings are less formal and arcane and allow parties to be represented by persons other than legal counsel. Representation costs are therefore expected to be significantly less than are presently incurred in judicial litigation.

The proposed amendments do not increase existing penalty amounts for violations. As stated administrative penalties cannot exceed historic levels for violations that have in the past been judicially enforced and that administrative penalties can only be assessed for those categories of violations for which the state board presently maintains the authority to impose civil penalties.

D. Fiscal and Economic Impacts on State and Local Government

It is not anticipated that this rulemaking will have a significant effect on local agencies or local programs or funds. While state and local government entities are subject to the same air pollution rules as businesses and individuals, and therefore may be subject to a monetary penalty if locally owned equipment or vehicles were found to be in violation, the proposal does not increase potential penalties. (See previous discussion in section C. above. SB 527 merely provides an alternative means for enforcing existing air quality laws and associated penalty provisions for violations.

Staff has determined that the proposed amendments will not create any costs or savings, as defined by Government Code section 11346.5(a)(6) to any state agency or in federal funding to the state pursuant to Part 7 (commencing with section 17500) Division 4, title 2 of the Government Code, or other discretionary savings to local agencies.

E. Alternatives Considered

Staff has determined that no alternative to this proposal would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective and less burdensome to the affected persons than the proposed action.

SB 527 provides that the ARB may establish an alternative process for enforcing violations of the HSC and the ARB adopted rules and regulations. As stated above, the ARB has determined that adopting administrative procedures for assessing and adjudicating civil penalties for the violations covered in SB 527 is, in some circumstances, more efficient than judicial enforcement, while being equally protective of a party's due process. Accordingly, the ARB has rejected the alternative of not adopting administrative procedures for enforcing violations covered in SB 527.

In SB 527, the Legislature set forth specific directives for the ARB to follow if it elects to implement an alternative administrative enforcement process. Specifically, it directs the ARB to use the existing administrative procedures found at title 17, CRR §60065.1 et seq. and §60075.1 et seq., with certain expressed exceptions (e.g. use of hearing officers from the Office of Administrative Hearings, maximum caps on penalty assessments, limitations on penalty assessment authority, etc.) Thus, because of the expressed legislative directives, alternatives to the proposed administrative procedures are limited.

After public notice, the ARB staff held workshops to review the initial drafts of the proposed amendments implementing the requirements of SB 527. The staff received no suggested alternatives to the proposed amendments from interested stakeholders. Accordingly, because of the specific mandates of SB 527 and the fact that no suggested alternatives have been received, not other alternatives to the suggested amendments have been considered.

Attachment A

PROPOSED AMENDMENTS

COMPLAINTS, title 17, CCR sections 60065.1 et seq.

STATE OF CALIFORNIA
AIR RESOURCES BOARD

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING
PROCEDURES FOR REVIEW OF COMPLAINTS

Note: Proposed new language is indicated by underline and proposed deletions are shown in ~~strikethrough~~.

Article 3. Administrative Hearing Procedures for Review of Complaints

Subarticle 1. General Provisions

§ 60065.1. Applicability.

(a) This article governs hearings to review complaints issued by the state board pursuant to Health and Safety Code sections 42410, 43023, and 43028. The procedures outlined here do not apply to citations that are subject to review under Article 5, section 60075.1, et seq.

(b) The provisions of this article apply only to complaints filed on or after the effective date of this article.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathew v Eldridge 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 60075.1, et seq., title 17 and 2048, title 13, California Code of Regulations; Sections 11500, et seq., Government Code.

§ 60065.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010), ~~and in Title 13, California Code of Regulations, Chapter 5, Standards for Motor Vehicle Fuels, sections 2250, et seq., and Chapter 8, Clean Fuels Program, sections 2300, et seq.~~

(b) The following definitions also apply:

(1) "Administrative record" means all documents and records timely filed with the hearing office, pursuant to section 60065.4 and the time deadlines of these rules, including pleadings, petitions, motions, and legal arguments in support thereof; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer or executive officer regarding the complaint at issue; administrative record does not include any prohibited communications as defined in section 60065.13, and any settlement discussions or offers of settlement pursuant to section 60065.25.

(2) "Complainant" means the state board, acting through any of its

employees that have been authorized to investigate, issue, and prosecute a complaint under this article.

(3) "Complaint" means a document, other than a citation issued for a Class I violation pursuant to title 17, California Code of Regulations, section 60075, issued by the complainant that seeks administrative civil penalties as an alternative to judicial civil penalties. ~~alleges a violation(s) of Part 5 of the Health and Safety Code (other than a Class I violation for which a citation may be issued under Article 5 of this chapter) or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards.~~

(4) "Consent Order" means an order entered by the hearing officer in accordance with the settlement agreement of the parties.

(5) "Days" means calendar days.

(6) "Default" means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.

(7) "Discovery" refers to the process set forth in section 60065.26 allowing one party to request and obtain information relevant to the complaint proceedings. The scope of discovery is limited by the express terms of that section.

(8) "Ex Parte Communication" means an oral or written communication not on the public record for which reasonable prior notice to all parties should have been given.

(9) "Hearing Office" refers to the administrative hearings office established by the state board to conduct administrative hearings to implement the provisions of these rules or to the Office of Administrative Hearings established pursuant to Government Code section 11370.2. The administrative hearing office of the state board shall include at least one administrative law judge who shall act as a hearing officer.

(10) "Hearing Officer" is either an administrative law judge appointed by the state board to conduct hearings under these procedures pursuant to Health and Safety Code section 43028, or an administrative law judge within the Department of General Services, State Office of Administrative Hearings (OAH) who shall be appointed to conduct hearings pursuant to Health and Safety Code sections 42410 and 43023. Only appointed administrative law judges shall act as hearing officers.

(11) "Intervenor" means a person who is allowed to voluntarily enter into the proceedings with leave of the hearing officer.

(12) "Party" includes the complainant, respondent, and an intervenor to

the extent permitted by the hearing officer pursuant to section 60065.22.

(13) "Proceeding" means any hearing, determination or other activity before the hearing officer involving the parties to a complaint.

(14) "Respondent" means any person against whom a complaint has been filed under this article.

(15) "Response/Request for Hearing" means a document, responsive to the complaint and signed by the respondent, in which respondent requests a hearing before an administrative law judge and admits or denies the allegations of the complaint or asserts affirmative defenses to the action.

(16) "Settlement Agreement" means a written agreement executed by the complainant, respondent, and, to the extent permitted by the hearing officer pursuant to section 60065.22(b)(4), an intervenor, that respectively settles the allegations of violation set forth in the complaint. Settlement agreements of a complaint should include:

(A) Stipulations by the parties establishing subject matter jurisdiction;

(B) An admission by respondent that it has committed the violations as alleged in the complaint or a statement by respondent that it neither admits nor denies such violation(s); and

(C) The terms and conditions of the settlement.

NOTE: Authority cited: Sections 39010, 39600, 39601, 42410, 43023, 43028, and 43031(a), et seq., Health and Safety Code. Reference: Mathews v. Eldridge, Mathew v. Eldridge 424 U.S. 319 (1976); Sections 39010, 39514, 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code, Part 5, (commencing with 39010) Health and Safety Code; Sections 2250, et seq., 2300, et seq., title 13; Sections 60075.1, et seq., Article 5, title 17, California Code of Regulations.

§60065.3. Right to Representation.

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. The right to representation is at the party's own expense. Following notification that a party is represented by a person other than him or herself, all further communications regarding the proceedings shall be directed to that representative.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the procedures set forth in these rules and the proper instructions or orders of the hearing officer.

(c) A representative may withdraw an appearance by filing a written notice of withdrawal with the hearing office and by serving a copy on all parties.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43029, 43030, 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 2180, et seq., title 17 and title 13, California Code of Regulations.

§ 60065.4. Time Limits; Computation of Time.

(a) All actions required pursuant to these rules shall be completed within the times specified in this article, unless extended by the hearing officer upon a showing of good cause, after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing or completing any other required action must be received in advance of the date on which the filing or action is due and should contain sufficient facts to establish a reasonable basis for the relief requested.

(b) In computing the time within which a right may be exercised or an act is to be performed, the day of the event from which the designated period runs shall not be included and the last day shall be included. If the last day falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.

(c) In computing time, the term "day" means calendar day, unless otherwise provided.

(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.

(e) Where service of any pleading, petition, letter, document, or other writing is by mail, overnight delivery, or facsimile transmission (fax), pursuant to section 60065.5(c), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed shall be extended as provided in section 60065.5(c).

(f) Papers delivered to or received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that date. Papers delivered or received at times other than regular business hours will be filed on the next regular business day.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code.

§ 60065.5. Service, Notice and Posting.

(a) Except as otherwise provided in this article, the original of every pleading, petition, letter, document, or other writing served in a proceeding under these rules shall be filed with the hearing office.

(b) The complaint and all accompanying information shall be served on the respondent personally or by registered mail.

(c) Except as provided in (b) above and unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class or interoffice mail, by overnight delivery, or by fax.

(1) Service is complete at the time of personal delivery.

(2) In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and fifteen days if the place of address is outside the United States.

(3) If served by overnight delivery, or interoffice mail, the document must be deposited in a box or other facility regularly maintained for interoffice mail or by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service or

otherwise at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(d) Each document filed shall be accompanied by a proof of service on each party or its representative of record on the date of service. The proof of service shall state whether such service was made personally, first-class mail, overnight delivery, or fax.

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of her the person to whom the documents were handed, the person making the service may substitute a physical description for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.

(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed and signed below this.

(f) Proof of service made in accordance with Code of Civil Procedure section 1013a complies with this regulation.

(g) Service and notice to a party who has appeared through a representative shall be made upon such representative.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43029, 43030, 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a.

§ 60065.6. Motions.

(a) Any motion or request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefore.

(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.

(c) The hearing office shall set the time and place for the hearing of the motion. The hearing shall occur as soon as practicable.

(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument, the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call. The hearing officer may order that the proceedings be recorded.

(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.

(f) A request for a prehearing conference or a settlement conference under sections 60065.27 and 60065.28 does not constitute a motion within the meaning of this section.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403,

42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43029, 43030, 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code.

§ 60065.7. Form of Pleadings.

(a) Except as otherwise expressly provided in this article or by the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.

(b) The original of any pleading, letter, document, or other writing (other than an exhibit) shall be signed by the filing party or its representative. The signature constitutes a representation by the signer that it has read the document, that to the best of its knowledge, information and belief, the statements made therein are true, and that it has not filed the document for the purpose of delay.

(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the party) and shall contain his or her name, address and telephone number. Any changes in this information shall be communicated promptly to the hearing office and all parties to the proceeding. A party who fails to furnish such information and any changes to it shall be deemed to have waived his or her right to notice and service under these rules.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code.

§ 60065.8. Limitations on Written Legal Arguments or Statements

(a) Any written legal argument or statement submitted to the hearing officer by a participant in an action under this part shall be double spaced and typed in a font size 12 point or larger. Except as otherwise provided by this part, further limited by the hearing officer, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:

(1) Fifteen pages, for arguments in support of or opposition to motions;
and

(2) Five pages, for reply arguments.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403,

42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code.

§ 60065.9. Records of the State Board.

Except where public disclosure of information or exhibits is restricted by law, records of the state board are public records and are available to the public pursuant to section 91000, et seq., title 17, California Code of Regulations.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code; Sections 6250, et seq., Government Code; Sections 91000, et seq., title 17, California Code of Regulations.

§ 60065.10. Interpreters and Other Forms of Accommodation.

(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than ten days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.

(b) The cost of interpreter services shall be paid by the state board if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including the ability of the party in need of the interpreter to pay the cost.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code; Sections 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code.

Subarticle 2. Hearing Officers

§ 60065.11. Authority of Hearing Officers.

In any matter subject to hearing pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in

proceedings governed by these rules, including, but not limited to, authority to hold prehearing conferences; conduct hearings to determine all issues of fact and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code; Sections 11181-11182 and 11425.30, Government Code.

§ 60065.12. Disqualification.

(a) The hearing officer shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing.

(b) A hearing officer may not hear any case in which he or she has previously served as an investigator, prosecutor, or advocate.

(c) Any party may request the disqualification of a hearing officer or the executive officer, on a request for reconsideration, by filing an affidavit or declaration under penalty of perjury. A request against the hearing officer must be made no later than five days prior to the commencement of a prehearing conference or first day of hearing on the merits, whichever is earlier. A request for disqualification of the executive officer must be included in the request for reconsideration. The affidavit or declaration must state with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be respectively determined by either the hearing officer or the executive officer against whom the request for disqualification has been filed.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403,

42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43031(a), 43201, 43211, and 43212, Health and Safety Code; Sections 11425.40 and 11512, Government Code.

Subarticle 3. Ex Parte Communications

§ 60065.13. Prohibited Communications.

(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to section 60065.38.

(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60065.5.

(c) For the purpose of this section, a proceeding is pending from the time that the ~~petition for review of an executive officer decision~~ complaint is filed.

(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to section 60065.38.

(e) A communication between a hearing officer and an employee of the state board that would otherwise be prohibited by this section is permissible if:

(1) The employee is another hearing officer or other employee of the hearing office whose job duties include aiding the hearing officer in carrying out the hearing officer's adjudicative responsibilities. Upon request, the hearing office will provide a list of employees of the hearing office to the parties.

(2) The employee of the state board has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, or in any factually related proceedings, and the purpose of the communication is to assist and advise the hearing officer in determining whether a document is a confidential business record (i.e., trade secrets). In obtaining such assistance and advice, the hearing officer shall give notice to the parties of the person consulted and shall provide the parties with as detailed a summary as possible of the substance of the advice received, while

protecting the confidentiality of the business records at issue, and a reasonable opportunity to respond.

(3) The prohibitions of paragraph (a) that apply to the hearing officer shall also apply to all employees covered by subparagraphs (1) and (2) above.

(4) Communications permitted under subparagraphs (1) and (2) above shall not furnish, augment, diminish, or modify the evidence in the record.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42403.2, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.

§ 60065.14. Disclosure of Communication.

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The hearing officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a

hearing that hearing having been concluded.

(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600 and 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, and 43029, 43030, 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.

§ 60065.15. Applicability to Executive Officer.

(a) The provision of Subarticle 3 governing ex parte communications to the hearing officer also governs ex parte communications with the executive officer on matters that may come before him or her pursuant to Subarticle 9. Irrespective of the prohibitions of section 60065.13(a), the executive officer may consult with state board personnel who are not involved as an investigator, prosecutor, or advocate in the proceedings or preadjudicative proceedings of the matter before the executive officer, or in a factually related case, and whose job duties include assisting the executive officer in his or her adjudicative responsibilities.

(b) Except as otherwise provided in these procedures, while a proceeding is pending, the hearing officer shall have no communication, direct or indirect, with the members of the state board regarding the merits of any issue in the proceeding.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code; Sections 11430.70 - 11430.80 Government Code.

Subarticle 4. Issuance of and Response to Complaints

§ 60065.16. Violations Subject to a Complaint; Issuance.

(a) A complaint may be issued for violations: if

(1) Arising under part 5, chapters 1 through 4 and chapter 6 of division 26 of the Health and Safety Code, or violations of any rule, regulation, permit, variance, or orders of the state board adopted or issued pursuant to authority granted under those Health and Safety Code provisions; The violation alleged arises under Part 5 of the

~~Health and Safety Code, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards;~~

~~(2) Of regulations adopted and orders issued by the state board pursuant to authority granted under parts 1 through 4 of division 26 of the Health and Safety Code. The state board has determined that the alleged violations is not a Class I violation that is subject to a citation under Title 13, California Code of Regulations, Article 5, section 60075.1, et seq.; and~~

~~(b) (3) Complaints issued pursuant to Health and Safety Code 43028 shall not seek penalties that The penalty for each violation does not exceed \$25,000 per violation for each any day of violation or and the total penalties penalty in excess of for all violation's alleged in a complaint does not exceed \$300,000.~~

~~(c) Complaints issued pursuant to Health and Safety Code sections 42410 and 43023 shall not seek penalties in excess of the lesser of the maximum amount allowed by statute for a violation or \$10,000 per violation for any day in which the violation occurs, with a total penalty assessment not to exceed \$100,000. In determining the amount allowed by statute, the ARB shall use the method of calculation set forth in the underlying statute (e.g., HSC §43016 states that penalties shall be assessed on a per vehicle basis.)~~

~~(d) The state board shall not issue a complaint for any violation if:~~

~~(1) The state board shares concurrent enforcement jurisdiction with a district and the district has commenced an enforcement action for that violation;~~

~~(2) The state board has determined the violation to be a Class I violation as defined in title 17, California Code of Regulations, sections 60075.2(b)(5) and 60075.11.~~

~~(e) (b) A complaint shall include:~~

~~(1) The names of each respondent alleged to have committed a violation(s) covered under this article;~~

~~(2) A statement of the facts, in ordinary and concise language, that specifically identifies the statutes and/or rules alleged to have been violated and the acts or omissions of the respondents that constitute the alleged violation(s). The statement shall be specific enough to afford the named respondents notice and information in which to prepare a defense;~~

~~(3) A proposed penalty that complainant seeks for the alleged violations committed;~~

~~(4) Reference to these procedures, notice that a copy of the procedures~~

are is available from the ARB hearing office (the address and phone number of which shall be set forth), and notice that Chapter 5 (commencing with section 11500) of the Government Code is not applicable to these proceedings;

(5) Written notice to the respondent that, within 30 days from the date of service, it may respond to the allegations of the complaint by filing a and response/request for a hearing that the matter be heard by an administrative law judge.

It The notice shall also inform the respondent of the consequences of failing to respond by the applicable deadline;

(6) Written notice to the respondent that it has under the hearing procedures the right to counsel; and, if necessary, the right to an interpreter; or

(7) The address of the office issuing the complaint; the address to which payment of the proposed penalty may be sent; and the address of the hearing office to whom a response/request for a hearing may shall be submitted.

(f e) A complaint shall be filed with the appropriate hearing office and served on the named respondent(s) by either personal or other form of service consistent with Code of Civil Procedure sections 415 through 417 service or by certified mail, restricted delivery.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Part 5, Health and Safety Code; Sections 60075.1, et seq., title 13, California Code of Regulations.

§ 60065.17. Withdrawal of or Amendment to the Complaint.

(a) The complainant may without prejudice withdraw or amend the complaint once as a matter of right at any time before respondent has filed its response.

(b) After the response has been filed, the complainant may move to withdraw or amend the complaint. A motion to amend the complaint must include the proposed amendment. The hearing officer may grant the motion upon finding that good cause exists and that the amendment is in the interest of justice.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.18. Response/Request for Hearing to Complaint by Respondent.

(a) Within 30 days after service of the complaint, the respondent or ~~counsel for the respondent~~ its representative may file a response/request for hearing to the complaint with the hearing office designated in the complaint. In addition to requesting a hearing before an administrative law judge, in which the respondent may:

- (1) Object to the complaint on the ground that it does not state acts or omissions upon which the agency may proceed;
- (2) Object to the form of the complaint on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense;
- (3) Admit or deny the complaint, in whole or in part, specifying each allegation of fact or conclusion of law as to liability which is in dispute;
- (4) Present new matters by way of affirmative defenses; or
- (5) Oppose or agree to pay the penalty amount proposed in the complaint.

(b) The time period for response may be extended:

- (1) By stipulation of the parties for 30 additional days to allow the parties to conduct informal settlement negotiations; or
- (2) At the discretion of the hearing officer, for a period of up to 60 days, if the respondent can show good cause and if the complainant is not prejudiced by such a delay.

(c) Each uncontested allegation in the complaint shall be deemed admitted by the respondent.

(d) If the respondent fails to respond to the complaint in the time periods provided in this section, the matter shall be considered a default, pursuant to section 60065.41 and the respondent shall be considered to have waived his or her right to appear in the matter covered by the complaint.

(e) If a complaint is amended prior to the time respondent's response was due under subparagraph (a), respondent shall have 15 additional days from the date of service of the amended complaint to file the response.

(f) The respondent may move to amend its response to the complaint. Such motion must include language of the proposed amendment. The hearing officer may

grant the motion upon finding that good cause exists and that the amendment is in the interest of justice.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.19. Issues for Hearing.

The issues for hearing shall be limited to those raised in the complaint or amended complaint and the response or amended response. If the complaint alleges a repeat violation and the validity of the earlier violations(s) was not contested because of the respondent's failure to file a response/request for hearing the validity of the earlier violations(s) shall not be at issue.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.20. Cease and Desist Orders; Stays Pending Hearing.

If the ARB enforcement staff has issued a cease and desist order against the respondent for alleged violations set forth in the complaint, the respondent may request a stay pending hearing from the hearing officer. The hearing officer may grant a stay - pending issuance of a hearing officer decision under section 60065.39, unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay. The hearing officer may conduct a hearing or request such submissions by the parties as necessary to obtain information to make a determination on this issue.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

Subarticle 5. Prehearing Procedures

§ 60065.21. Scheduling of Hearings.

(a) Upon filing of a complaint issued pursuant to authority granted under Health and Safety Code sections 42410 and 43023, with OAH, the matter shall be assigned to a hearing officer.

(a) (b) Upon issuance filing of a complaint issued pursuant to Health and Safety Code section 43028, the hearing office of the state board shall assign refer the matter to the administrative hearing office of the state board for assignment of a hearing officer of the state board. The hearing office shall assign an administrative law judge from the hearing office to hear the matter, unless staffing and other resources of the hearing office would prevent timely consideration of the matter. If the resources of the state board's administrative hearing office prevent assignment, the administrative hearing office shall refer the matter to the OAH State office of Administrative Hearings for assignment.

(b) (c) The hearing office in which a complaint is filed shall as expeditiously as possible, but no later than 30 days after issuance a response/request for hearing of to the complaint has been filed or 45 days from the date that the complaint was issued if no response/request for hearing has been filed, assign the matter to a hearing officer and schedule the matter for hearing on the merits of the complaint. Except as provided in paragraph (f), below, a hearing shall on the merits of a complaint, in general, be scheduled for to be heard no later than 180 days from the date of issuance of the complaint or from receipt of the petition for review, unless the hearing officer determines, for good cause, that a later hearing date is necessary and in the interest of justice.

(c) (d) The hearing office shall deliver or mail a notice of hearing to all parties at least 30 days prior to the hearing. The notice shall be in the form specified in section 11509 of the Government Code, and shall also provide notice of the availability of interpreters pursuant to section 60065.10 of these rules.

(d) (e) The hearing officer shall grant such delays or continuances as may be necessary or desirable in the interest of fairly resolving the case.

(1) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, continue a hearing to another time or place.

(2) A party shall apply to the hearing officer for a continuance not less than five days prior to the scheduled hearing.

(3) When a continuance is ordered during a hearing, the hearing officer shall give written notice of the time and place of the continued hearing.

(e) (f) The hearing office shall set the place of hearing at a location as near as practicable to the place where the respondent resides or maintains a place of business

in California. If the respondent does not reside or maintain a place of business in California, the hearing shall be in Sacramento. The hearing officer may establish hearing locations anywhere in the state; at a minimum one hearing location shall be established in Sacramento and one in the Los Angeles area.

(f) (g) Upon the motion of any party and a showing of good cause, or upon the motion of the hearing officer, and in the absence of an objection from any party, the hearing officer may exercise discretion to conduct all or part of a hearing by telephone.

(1) In granting such a motion, the hearing officer must be assured that each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe all exhibits fully.

(2) The hearing officer may direct the party who has requested the alternative method to make the necessary arrangements and be responsible for any associated costs.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11509 and 11440.30, Government Code.

§ 60065.22. Motion to Intervene.

(a) A person may file a motion to intervene, and the hearing officer may grant such a motion if all of the following conditions are satisfied:

(1) The motion is in writing, with copies served on all parties named in the complaint ~~or the petition for review~~.

(2) The motion is made as early as practicable prior to the prehearing conference, if one is held, or the first day of the hearing on the merits of the complaint ~~or petition for review~~.

(3) The motion states facts demonstrating that the requesting intervenor's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that it qualifies as an intervenor under a statute or regulation.

(4) The hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

(b) If motion is granted, the hearing officer may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted

or at a later time. Conditions may include:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(2) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

(3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(4) Limiting or excluding the intervenors's participation in settlement negotiations.

(c) The hearing officer shall issue an order granting or denying the motion for intervention as soon as practicable in advance of the hearing, briefly stating the reasons for the order and specifying any conditions that he or she has determined as appropriate. The hearing officer may modify the order at any time, stating the reasons for the modification. The hearing officer shall promptly give notice of any order granting, denying, or modifying intervention to the applicant and to all parties.

(d) Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made at the sole discretion of the hearing officer, based upon his or her knowledge and judgment. The determination is not subject to administrative or judicial review.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Section 11440.50, Government Code.

60065.23. Consolidation, Separation of Proceedings.

(a) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may consolidate for hearing and decision:

(1) Any number of proceedings involving the same respondent or petitioner; and

(2) Any number of proceedings involving common issues of law or fact

where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of the parties.

(b) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§60065.24. Prehearing Conference.

(a) In any action in which the respondent timely responds pursuant to section 60065.18, ~~or a petition for review has been scheduled for hearing~~, the hearing officer may require a prehearing conference upon his or her own order or the request of any party. A request for a prehearing conference shall be in writing, addressed to the hearing officer and served on all parties.

(b) A prehearing conference shall be held no later than 30 days after an order of the hearing officer or a request by a party, but no later than 90 days from the date of respondent's filing of the response to a complaint ~~or receipt of the petition for review~~.

(c) The hearing officer may conduct the conference in person or by telephone.

(d) At least ten business days before a scheduled conference, each party shall file with the hearing office and serve on all other parties a prehearing conference statement which shall contain the following information:

- (1) Identification of all operative pleadings by title and date signed;
- (2) The party's current estimate of time necessary to try the case;
- (3) The name of each witness the party may call at hearing along with a brief statement of the content of the witness's expected testimony;
- (4) The identity of any witness whose testimony will be presented by affidavit pursuant to section 60065.29, if known;
- (5) The name and address of each expert witness the party intends to call at hearing along with a brief statement of the opinion the expert is expected to give.

The party shall also attach a copy of a current resumé for each expert witness;

(6) Whether there is need for an interpreter or special accommodation at the hearing;

(7) A list of the documentary exhibits the party intends to present at hearing and a description of any physical or demonstrative evidence; and

(8) A concise statement of any legal issues which may affect the presentation of evidence or the disposition of the case.

(9) If the matter is a complaint proceeding, the complainant shall specify the proposed penalty and state the basis for that penalty. The respondent shall provide all factual information it considers relevant to the assessment of a penalty.

(e) At the prehearing conference the hearing officer may:

(1) Establish a time and place for further proceedings in the action, but no hearing on the merits of the action shall take place sooner than 30 days following the date of the prehearing conference;

(2) Attempt to simplify issues and help the parties to stipulate to facts not in dispute;

(3) Explore the necessity or desirability of amendments to the pleadings; and

(4) Discuss any other appropriate subject.

(f) After the prehearing conference, the hearing officer shall issue a prehearing order which incorporates the matters determined at the conference. This order may be issued orally if an accurate record can be made. Agreement on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be made the subject of a written order by the hearing officer. If no matters were determined or dates set at the prehearing conference, a prehearing order is not required. The hearing officer may, to aid the efficient administration of justice, modify the prehearing order as necessary.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§60065.25. Settlement Agreements and Consent Orders.

(a) At any time before a final decision of the hearing officer, the complainant and the respondent may settle an action, in whole or in part, ~~by agreeing upon a civil penalty, with or without conditions or other appropriate remedy.~~

(b) The parties may request the assistance of the hearing office in their attempts to settle the matters at issue. Upon receiving such a request, the hearing office may assign a settlement hearing officer, who is not the same hearing officer that has been assigned, to hear the merits of the case, unless the parties specifically request in writing the assignment of the latter hearing officer. For cases assigned to OAH, OAH may assign administrative law judges from the state board to assist in settlement discussions.

(c) The parties shall memorialize any agreement in writing.

(d) In a complaint proceeding, the hearing officer assigned to hear the merits of the case, shall thereafter enter a consent order in accordance with the terms of the settlement agreement. Such consent order is not subject to further review by the agency or a court.

~~(e) In a petition for review proceeding, if the parties resolve all issues raised by the petition, the petitioner shall agree to withdraw the petition and the case shall be dismissed.~~

~~(f)~~ (e) If the filing of the consent order pursuant to paragraph (d) of this section or the settlement in the petition for review proceeding does not wholly conclude the action, the hearing officer assigned to hear the merits of the case shall promptly inform the parties of the schedule of the remaining proceedings.

~~(g)~~ (f) Unless the parties have otherwise consented to use the hearing officer assigned to hear the merits of the case in settlement discussions, settlement discussions or offers of compromise regarding unresolved issues shall not be discussed with that hearing officer. Settlement discussions or offers of compromise shall also not be made part of the record of the proceedings.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Section 11415.60, Government Code.

§ 60065.26. Discovery.

(a) The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by these hearing procedures. However, nothing in this section prohibits the parties from voluntarily stipulating to provide discovery deemed appropriate. This section does not authorize the inspection or copying of, any writing, or thing which is privileged from disclosure by law or protected as part of an attorney's work product.

(b) The names and addresses of witnesses; inspection and copying of documents and things.

(1) Unless otherwise stipulated to by the parties, within 45 days of issuance of a complaint or amended complaint, a party may request:

(A) The names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; and

(B) The opportunity to inspect and make a copy of any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody or control of the other party and would be admissible in evidence. This includes the following information from inspection or investigative reports prepared by, or on behalf of, any party that pertain to the subject matter of the proceeding: (i) the names and addresses of witnesses or of persons (other than confidential informants) having personal knowledge of the issues involved in the proceeding, (ii) matters perceived by the investigator in the course of his or her investigation (as opposed to his or her analysis or conclusions), and (iii) statements related to the issues of the proceedings which are otherwise admissible. For purposes of this section, "any thing, document, statement or other writings relevant to the issues for hearing that are in the possession, custody, or control of the other party" would include those items within the possession, custody, or control of a third-party who obtained or used such items while acting as a representative, contractor, or agent of the "other party."

(2) Parties shall arrange a mutually convenient time for the exchanging of the names and addresses of witnesses and the inspecting and copying of relevant things, documents, statements, and other writings identified in subparagraph (B) above, but such date shall not be later than 30 days from the date of receipt of the request made pursuant to subparagraph (b)(1). Unless other arrangements are made, the party requesting the writings shall pay for the copying.

(3) All requests under subparagraph (b) are continuing, and the party receiving the request shall be under a continuing duty to provide the requesting party with the information requested.

(4) Absent a stipulation between the parties, a party claiming that certain writings or things are privileged against disclosure shall, within 15 days of receipt of the request for inspection and copying, serve on the requesting party a written statement setting forth what matters it claims are privileged and the reasons supporting its claims.

(c) Other Discovery.

(1) A party may file a motion requesting that the hearing officer order further discovery. The motion shall specify the proposed method of discovery to be used and shall include affidavits describing in detail the nature of the information and/or documents sought, the proposed time and place of the discovery (if applicable), and the information addressing the findings listed in subparagraphs (A)-(D) below. The hearing officer shall grant the motion upon finding that:

(A) The additional discovery will not unreasonably delay the proceedings;

(B) The information to be obtained from the discovery is most reasonably obtained from the non-moving party, who has refused to provide it voluntarily; or that

(C) The information to be obtained is relevant and has significant probative value on a disputed issue of material fact regarding a matter at issue.

(2) The hearing officer may order the taking of oral depositions only under the following circumstances:

(A) After affirmatively making the findings in subparagraphs (c)(2)(A)-(C), and further finding that the information sought cannot be obtained by alternative methods; or

(B) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) If the hearing officer grants the motion for the taking of a deposition, the moving party shall serve notice of the deposition on the person to be deposed with copies served on the other parties at least ten days before the date set for the deposition.

(4) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of the court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.

(d) Third-Party Notice of Request for Disclosure of Information Identified as Confidential and Opportunity to Participate.

(1) A third-party shall be notified whenever a party receives a request for disclosure of information that is in the possession, control, or custody of the party subject to a claim of confidentiality asserted by the third-party, including, but not limited to, claims of confidentiality asserted pursuant to the California Public Records Act (CPRA). This section creates rights and obligations in addition to, and does not affect, existing rights and obligations under the CPRA and applicable federal regulations.

(2) A third-party shall have the opportunity to be heard on all issues involving requests for disclosure of information that is in the possession, control, or custody of the party subject to a claim of confidentiality asserted by the third-party. Within five days of receipt of notice pursuant to subparagraph (d)(1), a third-party may object to disclosure of the subject information and may seek a protective order pursuant to subparagraph (e). Objections to disclosure may be based on all legal grounds, including, but not limited to, lack of relevance to the issues for hearing.

(e) Protective Orders:

(1) Upon motion by a party from whom discovery is sought, a third-party who has made a claim of confidentiality regarding the information to be discovered or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.

(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:

(A) The appropriate scope and terms of any governing protective order;

(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and

(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.

(3) A party or person seeking a protective order may be permitted to make all, or part of, the required showing in a closed meeting. The hearing officer shall have discretion to limit attendance at any closed meeting proceeding to the hearing officer and the person or party seeking the protective order.

(4) A protective order, if granted, shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing. The protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony obtained in a closed meeting, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties and that the material be sealed and filed separately from other evidence and exhibits in the hearing.

(7) The hearing office shall make a record of all closed meetings that are held under this section. The record shall be sealed and made available, upon appropriate order, to the state board or to the court review of the record.

(8) If the hearing officer denies a motion for protective order or grants a protective order only, in part, the order shall not become effective until ten days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

(f) Proceeding to Compel Discovery.

(1) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested or

stipulated discovery to comply. The motion shall include the following:

(A) Facts showing the party has failed or refused to comply with a discovery request or stipulation;

(B) A description of the information sought to be discovered;

(C) The reasons why the requested information is discoverable;

(D) Evidence that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made; and

(E) To the extent known by the moving party, the measures for the noncomplying party's refusal to provide the requested information.

(2) The motion shall be filed within 15 days after the date the requested information was to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.

(3) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.

(4) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.

(5) The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.

(6) Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole, or in part, the order shall not become effective until ten days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(7) If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order, the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11189 and 11507.6, Government Code; Section 915(b), Evidence Code.

§60065.27. Subpoena and Subpoena Duces Tecum.

(a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.

(b) At the request of a party, subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding, or the general counsel or executive officer of the complainant, or, if represented by an attorney, the attorney of record for a party in accordance with sections 1985-1985.4 of the California Code of Civil Procedure.

(c) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.

(d) The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony

pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(e) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(f) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.

(g) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.

(h) (1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the representative of the party or person.

(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(i) A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11186 - 11188 and 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code; Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.

§ 60065.28. Witness Lists and Exhibits.

(a) No later than ten days before the scheduled hearing date, the parties shall submit to the hearing office and serve upon the other parties:

(1) A list of the names, addresses and qualifications of proposed witnesses to be called in making the party's case-in-chief and a brief summary of the testimony to be presented by each witness; and

(2) Each document or other exhibit, the party expects to offer or may offer, if the need arises, into evidence in making the party's case-in-chief.

(b) The hearing officer may prohibit any party from presenting any witness or exhibit that has not been included on that party's witness list or submitted exhibits as required under paragraph (a) of this section.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.29. Motions for Summary Determination of Issues.

(a) Any party may file a motion for summary judgment or summary adjudication of the issues. Such motions shall include supporting legal argument, and where necessary, affidavits showing that there is no genuine issue of material fact for determination regarding the identified issues. A party opposing such a motion shall show by affidavit or other documentation that a genuine issue of material fact as to the issues raised exists. After reviewing the motion and response of the parties, the administrative record, and any arguments of the parties, the hearing officer shall determine whether a genuine issue of material fact as to the issues exists and whether a party is entitled to judgment on the issue(s) as a matter of law.

(b) If, upon considering a motion under subparagraph (c), the hearing officer determines that a party is entitled to summary judgment on the issue(s) as a matter of law, the hearing officer shall issue a written decision or order that sets forth necessary findings of fact and conclusions of law regarding all matters that were at issue. In a complaint proceeding, if the hearing officer decision finds the respondent to be in violation, the hearing officer shall follow the penalty assessment criteria set forth in section 60065.40.

(c) Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's

opposition, the hearing officer may deny the motion or may grant a continuance to permit affidavits to be obtained or to permit such additional discovery as provided under these procedures.

(d) The hearing officer shall deny a request for summary determination of the issue(s) if he or she finds the administrative record, including any evidence presented by the parties as part of this motion, present a genuine issue of material fact. If the hearing officer denies a request for summary determination, or denies such a request in part, the hearing officer shall promptly issue to each party a written ruling as to the existence of a genuine issue of material fact on the issue(s) and the reasons for the ruling. The matter shall continue to be set for hearing on all issues for which a genuine issue of material fact exists.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

Subarticle 6. Contempt and Sanctions

§ 60065.30. Contempt.

If any person in proceedings before the hearing officer disobeys or resists any lawful order or refuses to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or in its immediate vicinity as to obstruct the proceedings, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code section 11455.20.

Note: Authority cited: Sections 39600, 39601, 43028 and 42410, 43023, 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11455 and 11525, Government Code.

§ 60065.31. Sanctions.

(a) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions; the failure to comply with a discovery request or subpoena; or the failure to comply with a lawful order of the hearing officer.

(2) "Frivolous" means:

(A) Totally and completely without merit, or

(B) For the sole purpose of harassing an opposing party.

(b) An order for sanctions may be oral on the record or in writing and shall set forth the factual findings which are the basis for the imposition of sanctions.

(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer's discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party's conduct.

(2) Within five days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on the ground of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.

(c) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to Subarticle 11.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 11455.30 and 11525, Government Code.

Subarticle 7. Hearings

§ 60065.32. Failure to Appear.

If after service of a Notice of Hearing, including Notice of Consolidated Hearing or Continuance, a party fails to appear at a hearing either in person or by representative, the hearing officer may take the proceeding off calendar, or may, at the request of a party, or on his or her own motion, issue a default order in a complaint

proceeding in accordance with section 60065.38 of this article, or adversely rule against the absent party in a petition for review hearing.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.33. Conduct of Hearing.

(a) The hearing shall be presided over by a hearing officer who shall conduct a fair and impartial hearing in which each party has a reasonable opportunity to be heard and to present evidence.

(b) The hearing shall be conducted in the English language.

(c) Subject to reasonable limitations that may be imposed by the hearing officer, each party to the proceeding shall have the right to:

- (1) Call and examine witnesses;
- (2) Introduce exhibits;
- (3) Question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations;
- (4) Impeach any witness regardless of which party first called the witness to testify; and
- (5) Call and examine an opposing party as if under cross-examination, even if that party does not testify on his or her own behalf.

(d) Burden of Going Forth.

(1) The complainant shall have the initial burden of presenting evidence in support of issuance of the complaint, the requested penalty, and any other material that is pertinent to the issues to be determined by the hearing officer.

(2) At the conclusion of complainants case-in-chief, the respondent has the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the right to examine, respond to, or rebut the allegations of the complaint and any proffered evidence and material. The respondent may offer any documents, testimony,

or other exculpatory evidence which bears on appropriate issues, or may be relevant to the penalty amount.

(3) At the close of respondent's presentation of evidence, the parties respectively have the right to introduce rebuttal evidence that is necessary to resolve disputed issues of material fact, subject to any limits imposed by the hearing officer pursuant to subparagraph (e)(1) below.

(e) The hearing officer may:

(1) Limit the number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony, as necessary, to protect the interests of justice and conduct a reasonably expeditious hearing;

(2) Require the authentication of any written exhibit or statement;

(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence;

(4) Exclude persons whose conduct impedes the orderly conduct of the hearing;

(5) Restrict attendance because of the physical limitations of the hearing facility; or

(6) Take other action to promote due process or the orderly conduct of the hearing.

(f) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(g) Each matter in controversy shall be decided by the hearing officer upon a preponderance of the evidence.

(h) Hearings shall be recorded electronically. The recording made by the Administrative Hearing Office shall be the official recording of the hearing.

(1) A verbatim transcript of the official recording will not normally be prepared, but may be ordered by the hearing officer if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered by the hearing officer, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one copy to the hearing officer and one copy to every other party.

(2) The official recording of the hearing and transcript of the recording, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.34. Evidence.

(a) Testimony shall be taken only under oath or affirmation.

(b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. The hearing officer shall admit evidence which is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions, and which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but upon timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The application of these rules shall not affect the substantial rights of the parties as provided in the Evidence Code.

(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(d) Trade secret and other confidential information may be introduced into evidence. The hearing officer shall preserve the confidentiality of such information, and may make such orders as may be necessary to consider such evidence in a closed meeting, including the use of a supplemental order or decision to address matters which arise out of that portion of the evidence which is confidential.

(e) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the hearing officer.

(1) The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.

(2) The hearing officer may take official notice of those matters set forth in

section 452 of the Evidence Code.

(3) Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:

(A) The propriety of taking official notice; and

(B) The effect of the matter to be noticed.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Sections 451 and 452, Evidence Code.

§ 60065.35. Evidence by Affidavit or Declaration.

(a) At any time 20 or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced, but if it is allowed to be introduced, it shall only be given the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be a separate document concurrently served with the affidavit or declaration, entitled "Notice of Intent to Use Declaration or Affidavit in Lieu of Oral Testimony." The title shall be in bold print. The content of the notice shall be substantially in the following form:

"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or

delivery of the affidavit to the opposing party]."

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.36. Exclusion of Witnesses.

Upon motion of a party, the hearing officer may exclude from the hearing room any witnesses not at the time under examination; but the parties or their representatives to the proceeding shall not be excluded.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.37. Oral Argument and Briefs.

(a) Prior to the close of the hearing, the hearing officer may, on his or her own motion, or upon motion of a party, grant and determine the length of oral argument.

(b) Motions to submit written closing argument shall be made prior to the close of the hearing and shall be granted at the discretion of the hearing officer upon a determination that written argument will be productive and will not unreasonably delay the disposition of the proceeding. The hearing officer shall determine the appropriate page lengths of all post hearing briefs at the time he or she determines that the filing of closing arguments is appropriate. A party shall file written closing brief within 15 working days from the date of the hearing. Opposing parties may file a reply brief within 10 working days from service of the argument. The hearing officer may extend or reduce the above filing dates for submission of written argument for good cause.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

Subarticle 8. Decisions of the Hearing Officer

§60065.38. Default Order.

(a) Upon motion, the hearing officer may find a party to be in default upon failure, without good cause to file a timely response to the complaint as required under section 60065.18; to appear at a scheduled conference or hearing; or to comply with an order of the hearing officer.

(b) For purposes of a pending complaint action,

(1) A default by respondent shall constitute an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing of the factual allegations.

(2) A default by complainant shall constitute a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(c) No finding of default shall be made against the respondent unless the complainant presents sufficient evidence to establish a prima facie showing that the state board and the hearing officer had jurisdiction over the matters at issue and that the complaint was properly served.

(d) Within 10 days, the complainant shall present written evidence, supported by affidavits or declarations explaining the proposed penalty set forth in the complaint.

(e) Any proceeding may be reinstated by the hearing officer upon a showing of good cause that contains sufficient facts to show or establish a reasonable basis for the failure to appear at the hearing. The request for reinstatement shall be made by the defaulting party within 30 10 days of service of the default order.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§60065.39. Order or Decision of the Hearing Officer after a Complaint Hearing; Rehearing.

(a) Unless otherwise ordered, all complaint proceedings shall be submitted at the close of the hearing unless otherwise extended by the hearing officer or provided in these rules. Within a reasonable period of time after the proceeding is submitted, the

hearing officer shall make findings upon all facts relevant to the issues for hearing, and file an order or decision with the reasons or grounds upon which the order or decision was made.

(b) The order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.

(c) The order or decision may, based on the findings of fact, affirm, modify or vacate the alleged violations set forth in the complaint or the proposed penalty, or direct other relief as applicable.

(d) A copy of the order or decision shall be served on each party or representative together with a statement informing the parties of their right to petition the executive officer, for reconsideration of the order or decision pursuant to section 60065.41 of these rules.

(e) (1) Within five days of the filing of any order or decision, the hearing officer may, at the request of any party or on his or her own motion, on the basis of mistake of law or fact, issue a modified order or decision correcting a mistake or error with respect to any matters determined or covered by the previously issued order or decision. If necessary, the hearing officer may schedule further proceedings to address the issue(s).

(2) If a request has been filed under this subparagraph, the request shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request.

(3) The hearing office shall serve a copy of any modified order or decision on each party that had previously been served with the original order or decision. The modified order or decision shall supersede the previously served order or decision, and the date of service of the modified order or decision shall be the effective date of the decision and order for purposes of sections 60065.41 and 60065.44.

(f) The hearing officer shall certify the administrative record and shall make available copies of the administrative record and any issued orders or decisions to the executive officer.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.40. Penalty Assessment Criteria.

(a) In determining penalties for complaints issued under Health and Safety Code section 42410, the hearing officer shall consider all relevant circumstances, including, but not limited to:

- (1) The extent of harm caused by the violation;
- (2) The nature and persistence of the violation;
- (3) The length of time over which the violation occurs;
- (4) The frequency of past violations;
- (5) The record of maintenance;
- (6) The unproven or innovative nature of the control equipment;

(7) Any action taken by the respondent, including the nature, extent, and time of response of the cleanup and construction undertaken, to mitigate the violation;

(8) The financial burden to the respondent; and

(9) The penalties or range of penalties set forth in the underlying rules or regulations that have been violated.

(b) In determining penalties for complaints issued under Health and Safety Code sections 43023 and 43028, the hearing officer shall consider all relevant circumstances, including, but not limited to:

~~(a)~~ (1) The extent of harm caused by the violation to public health and safety and to the environment;

~~(b)~~ (2) The nature and persistence of the violation, including the magnitude of the excess emissions;

~~(c)~~ (3) The compliance history of the respondent, including the frequency of past violations;

~~(d)~~ (4) The preventive efforts taken by respondent, including the record of maintenance and any program to ensure compliance;

~~(e)~~ (5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods;

~~(f)~~ (6) The efforts to attain, or provide for, compliance;

~~(g)~~ (7) The cooperation of the respondent during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation; and

~~(h)~~ (8) For the person who owns a single retail service station, the size of the business; and

(9) The penalties or range of penalties set forth in the underlying rules or regulations that have been violated.

NOTE: Authority cited: Sections 39600, 39601, 42403, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 44011.6, 43154, 43201, 43211, and 43212 Health and Safety Code.

Subarticle 9. Reconsideration

§ 60065.41. Reconsideration by Executive Officer.

(a) A party aggrieved by an order or decision of a hearing officer in a complaint proceeding pursuant to section 60065.39 of these rules may, within 20 days of service of such order or decision, request that the executive officer reconsider the hearing officer decision with respect to any matters covered by the order or decision. The request for reconsideration shall be filed with the executive officer and shall be served on all parties and the hearing office. The request shall be deemed filed the date it is delivered or mailed to the executive officer.

(b) Within 20 days of issuance of an order or decision by a hearing officer in a complaint proceeding pursuant to section 60065.39 of these rules, the executive officer may, on his or her own motion, decide to order reconsideration of the order or decision of the hearing officer. The executive officer shall notify the parties and the hearing office of this decision.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§60065.42. Requirements in Filing Request for Reconsideration; Comments Opposing Request.

(a) A request for reconsideration of a hearing officer order or decision shall be signed by the party or its representative and verified under oath. The request shall be based upon one or more of the following grounds:

- (1) The hearing officer acted without or in excess of its powers;
- (2) The order or decision was procured by fraud;
- (3) The order or decision is not supported by the evidence or the findings of fact;
- (4) The requesting party has discovered new material evidence that could not, with reasonable diligence, have been discovered and produced at the hearing; or
- (5) The hearing officer has misapplied applicable law.

(b) Any request for reconsideration shall specifically detail the grounds upon which the requesting party considers the order or decision to be unjust or unlawful and every issue to be considered on reconsideration. The requesting party shall be deemed to have fully waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the request for reconsideration. The request for reconsideration will be denied if it contains no more than allegations of the statutory or constitutional grounds for reconsideration, unsupported by specific references to the record and principles of law involved.

(c) When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental papers or answers may be granted at the discretion of the executive officer. Parties requesting a copy of the hearing record shall bear the cost of reproduction.

(d) The request for reconsideration may include a request that the order or decision of the hearing officer be stayed pending resolution of the request for reconsideration. As stated in section 60065.48, the order or decision shall be automatically stayed for 30 days from the date of filing of the request for reconsideration.

(e) Within ten days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the executive officer. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed 6 pages.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, Mathews v. Eldridge, 424

U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212, Health and Safety Code.

Subarticle 10. Final Order or Decision; Judicial Review

§ 60065.44. Final Order or Decision; Effective Date.

(a) If no request for reconsideration of a hearing officer's order or decision is filed within 20 days of the service of an order or decision, and no reconsideration has been ordered by the executive officer on his or her own motion the order or decision of the hearing officer shall become final. The effective date of the final order or decision shall be 30 days from the date of service of the hearing officer order or decision on the parties.

(b) If a request for reconsideration has been filed but has been summarily denied because the executive officer has not taken any action on the request within 20 days after receipt of the request, the underlying hearing officer order or decision shall become final. The effective date of the order or decision becoming final shall be the date that the order summarily denying the request for reconsideration was served on the parties.

(c) If a request for reconsideration has not been summarily denied, the order or decision of the executive officer that addresses and fully disposes of the request for reconsideration is the final order or decision. The effective date of the order or decision shall be the date that the decision was served on the parties.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code.

§ 60065.45. Judicial Review.

(a) A party adversely affected by the a-final decision of the hearing officer or the executive officer on reconsideration, may seek judicial review by filing a petition for a writ of mandate in accordance with section 1094.5 of the California Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the agency. Such petition shall be filed within 30 days after the order or decision becomes final.

(b) The state board may seek to enforce a final order or decision in superior

court in accordance with applicable law.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028 and 43031(a), Health and Safety Code. Reference: ~~Mathews v. Eldridge~~, *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 42403, 42410, 43008.6, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, and 43212 Health and Safety Code; Section 1094.5, California Code of Civil Procedure.

Attachment B

PROPOSED AMENDMENTS CITATIONS, Title 17, CCR SECTIONS 60075.1 ET SEQ.

CALIFORNIA REGULATIONS FOR ADMINISTRATIVE HEARING
PROCEDURES FOR REVIEW OF CITATIONS

Note: Proposed new language is indicated by underline and proposed deletions are shown in ~~strikethrough~~.

Article 4. Administrative Hearing Procedures for Review of Citations

Subarticle 1. General Provisions

§ 60075.1. Applicability.

These rules shall govern hearings to review citations issued by the state board pursuant to Health and Safety Code sections 42410, 43023, 43028, 43031(a) and 44011.6.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.2. Definitions.

(a) The definitions applicable to these rules include those set out in the Health and Safety Code (commencing with section 39010), Title title 13, California Code of Regulations, section 2180.1, and Title 17, California Code of Regulations, sections 60040, et seq.

(b) The following definitions also apply:

(1) "Administrative record" means all documents and records timely filed with the hearing office, pursuant to section 60075.3 and the time deadlines of these rules, including pleadings, petitions, motions, and legal arguments in support thereof; all documents or records admitted into evidence or administratively noticed by the hearing officer; all official recordings or written transcripts of hearings conducted; and all orders or decisions issued by the hearing officer, executive officer, or the state board regarding the citation at issue; administrative record does not include any prohibited communications as defined in section 60075.14, and any settlement discussions or offers of settlement.

(2) "Citation" means an administrative action alleging one or more Class I violations as determined by the state board pursuant to section 60075.11.

(3) "Citee" means any person named in a citation as committing a Class I violation; in citations issued pursuant to Health and Safety Code section 44011.6 and Title title 13, CCR, section 2180, et seq., the citee is the vehicle owner as defined in section 2180.1(a)(21).

(4) "Citing Party" means the state board, acting through any of its employees that have been authorized by the state board or its executive officers, to investigate, issue, and prosecute a citation under this article.

(54) "Class I violation" means the type of violation for which issuance of a citation under this article is appropriate; it includes:

(A) All violations arising under Health and Safety Code sections 44011.6, et seq.; and

(B) Those violations that are less complex, less serious in nature as determined by one or more relevant factors listed in section 60075.11, and that the state board elects to address as "Class I violations."

~~(5) "Complainant" means the state board, acting through any of its employees that have been authorized by the state board or its executive officers, to investigate, issue, and prosecute a citation under this article.~~

(6) "Consent Order" means an order entered by the hearing officer in accordance with the settlement agreement of the parties.

(7) "Days" means calendar days.

(8) "Default" means the failure of any party to take the steps necessary and required by these regulations to further the hearing towards resolution, resulting in a finding by the hearing officer of forfeiture of the cause of action against that party.

(98) "Discovery" means the limited right to exchange documents and taking of depositions, as provided in Subarticle 7.

(10) "Executive Officer" is the executive officer of the state board.

~~(119) "Hearing Office" is the office established by the state board to conduct administrative hearings pursuant to Health and Safety Code sections 44011.6(m) and 43028, or the Department of General Services, Office of Administrative Hearings ("OAH"), established pursuant to Government Code section 11370.2, to implement the provisions of these rules. The hearing office shall include at least one administrative law judge who shall act as a hearing officer.~~

(1240) "Hearing Officer" is an administrative law judge appointed by the state board to conduct hearings pursuant to sections 44011.6 and 43028 of the Health and Safety Code and these rules, or an administrative law judge within OAH, who shall be appointed to conduct hearings pursuant to Health and Safety Code sections 42410 and 43023 and these rules. Only appointed administrative law judges shall act as hearing officers.

(1311) "Party" includes the complainant citing party and citee.

(1412) "Penalty" means ~~the civil~~ an administrative penalty assessed against a citee for one or more violations of the Act.

(1513) "Proceeding" means any hearing, determination or other activity before the hearing officer that involves the parties to a citation or consideration of the citation.

(1614) "Settlement Agreement" means a written agreement executed by complainant citing party and citee that respectively settles the allegations at issue in the citation. The settlement agreement shall include, but not be limited to, the following: (1) stipulations by the parties establishing subject matter; (2) an admission by citee that it committed the violations as alleged in the citation or a statement by citee that it neither admits nor denies that it committed such violations; and (3) the terms and conditions of the settlement.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.3. Time Limits; Computation of Time.

(a) All actions required pursuant to these rules shall be completed within the times specified in these rules, unless extended by the hearing officer upon a showing of good cause, and after consideration of prejudice to other parties. Requests for extensions of time for the filing of any pleading, letter, document, or other writing must be received in advance of the date on which the above is due to be filed and should contain sufficient facts to establish a reasonable basis for the relief requested.

(b) In computing the time within which a right may be exercised or an act performed, the day of the event from which the designated right or act begins shall be excluded and the last day shall be included. If the last day falls on a Saturday, Sunday, or a state holiday, time shall be extended to the next working day.

(c) In computing time, the term "day" means calendar day.

(d) Unless otherwise indicated by proof of service, the mailing date shall be presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed.

(e) Where service of any pleading, letter, document, or other writing is by mail, overnight delivery, or by facsimile transmission (fax), pursuant to section 60075.4(b), and if within a given number of days after such service, a right may be exercised, or an act is to be performed, the time within which such right may be exercised or act performed shall be extended as provided in section 60075.4(b). Such extensions shall not apply to extend the time for requesting a hearing pursuant to section 60075.17 of these rules.

(f) Papers received by the hearing office during regular business hours (8 a.m. to 5 p.m.) will be filed on that day. Papers received at times other than regular business hours will be filed on the next regular business day.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and 44011.6, Health and Safety Code.

§ 60075.4. Service, Notice and Posting.

(a) Except as otherwise provided, the original of every pleading, letter, document, or other writing served in a proceeding under these rules shall be filed with the hearing office.

(b) If a hearing is assigned to OAH, a copy of every pleading, letter, document or other writing served in a proceeding under these rules shall also be filed with the state board.

(cb) Unless otherwise required, service of any documents in the proceedings may be made by personal delivery; by United States first-class or interoffice mail, overnight delivery, or fax.

(1) Service is complete at the time of personal delivery.

(2) In the case of first-class mail, the documents to be served must be deposited in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, properly addressed to the person on whom it is to be served at the address as last given by that person on any document filed in the present cause of action and served on the party making service, or otherwise at the place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended five days if the place of address is within the State of California, 10 days if the place of address is outside the State of California, but within the United States, and 15 days if the place of address is outside the United

States.

(3) If served by overnight delivery, or interoffice mail, the document must be deposited in a box or other facility regularly maintained for interoffice mail or by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by the person on any document filed in the present cause of action and served on the party making service, or otherwise, at that place of residence of the person to be served. The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(4) If served by fax, the document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the present cause of action and served on the party making the service. The service is complete at the time of the transmission, but any period of notice and any right or duty to do any act or to make any response within any period or date prescribed after service of the document shall be extended two days.

(c) The proof of service shall be made by declaration by a person over the age of 18 years and shall state whether such service was made personally, by mail, overnight delivery, or by fax.

(1) Where service is made by personal delivery, the declaration shall show the date and place of delivery and the name of the person to whom the documents were handed. Where the person making the service is unable to obtain the name of the person to whom the documents were handed, the person making the service may substitute a physical description for the name.

(2) Where service is made by first-class mail or overnight delivery, the declaration shall show the date and place of deposit in the mail, the name and address of the person served as shown on the mailing envelope and that the envelope was sealed and deposited in the mail with the postage fully prepaid.

(3) Where service is made by fax, the declaration shall show the method of service on each party, the date sent, and the fax number to which the document was sent.

(d) Service and notice to a party who has appeared through a representative shall be made upon such representative.

(e) The proof of service declaration shall be signed by the person making it and contain the following statement above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at (City, State) on (Date)." The name of the declarant shall be typed or legibly printed and signed below this statement.

(f) Proof of service made in accordance with the Code of Civil Procedure section 1013a complies with this regulation.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11182 and 11184, Government Code; Sections 1013 and 1013a Code of Civil Procedure.

§ 60075.5. Form of Pleadings.

(a) Except as provided in this section, or by order of the hearing officer, there are no specific requirements as to the form of documents filed in a proceeding under these rules.

(b) The original of any pleading, letter, document, or other writing (other than an exhibit) shall be signed by the filing party or its representative. The signature constitutes a representation by the signer that it has read the document, that to the best of its knowledge, information and belief, the statements made therein are true, and that it has not filed the document for the purpose of delay.

(c) The initial document filed by any person shall indicate his or her status (as a party or representative of the party) and shall contain his or her name, address and telephone number. Any changes in this information shall be communicated promptly to the hearing office and all parties to the proceeding. A party who fails to furnish such information and any changes to it shall be deemed to have waived his or her right to notice and service under these rules.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.6. Limitations on Written Legal Arguments or Statements

Any written legal argument or statement submitted to the hearing officer by a

participant in an action under this part shall be legibly printed or double spaced and typed in a font size 12 point or larger. Except as otherwise provided by this part, further limited by the hearing officer, or otherwise authorized by the hearing officer for good cause shown, no written legal argument, exclusive of any supporting documentation, may exceed:

(1) 12 pages, for arguments in support of or opposition to motions; and

(2) Three pages, for reply arguments.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(1), 43154, 43421, 43211, 43212 Health and Safety Code.

§ 60075.7. Records of the State Board.

Except where public disclosure of information or exhibits is restricted by law, records of the state board are public records and are available to the public pursuant to section 91000, et seq., Title title 17, California Code of Regulations.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 6250, et seq., Government Code; sections 91000, et seq., title 17, California Code of Regulations.

§ 60075.8. Representation.

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. The right to representation is at the party's own expense. Following notification that a party is represented by a person other than him or herself, all further communications regarding the proceedings shall be directed to that representative.

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding. Persons who appear as representatives shall not engage in unethical conduct or intentionally fail to observe the provisions of these rules and the proper instructions or orders of the hearing officer.

(c) A representative may withdraw an appearance by filing a written notice of

withdrawal with the hearing office and by serving a copy on all parties.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.9. Interpreters and Other Forms of Accommodation.

(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, or any other form of reasonable accommodation that party shall be responsible for notifying the hearing office as soon as the requirement is known, but no later than 10 days prior to the first day of hearing. The hearing officer may allow later notification for good cause. The hearing office shall be responsible for securing the interpreter, and for providing reasonable accommodation.

(b) The cost of interpreter services shall be paid by the state board if the hearing officer so directs. In determining who should pay the cost of the interpreter, the hearing officer shall base the decision on equitable considerations, including, the ability of the party in need of the interpreter to pay the cost.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m) Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11435.25, 11435.30 and 11435.55, Government Code; Section 751, Evidence Code.

§ 60075.10. Motions.

(a) Any motion, including any request for action by the hearing officer relating to any proceeding pending before him or her filed by any party, except those made orally on the record at the hearing, shall be in writing and shall be directed to the hearing officer, with written notice and proof of service to all parties. The caption of each motion shall contain the title and docket number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefore.

(b) Except as otherwise provided by statute or these regulations, or as ordered by the hearing officer, a motion shall be made and filed at least 15 days before the date set for the motion to be heard or the commencement of the hearing on the merits. Any response to the motion shall be filed and served no later than five days before the motion is scheduled to be heard or as ordered by the hearing officer.

(c) The hearing officer shall set the time and place for the hearing of the motion. The hearing shall occur as soon as practicable.

(d) Except as otherwise provided by statute or these regulations, the hearing officer may decide a motion filed pursuant to this section without oral argument. Any party may request oral argument at the time of the filing of the motion or the response. If the hearing officer orders oral argument the party requesting oral argument, or any party directed to do so by the hearing officer, shall serve written notice on all parties of the date, time and place of the oral argument. The hearing officer may direct that oral argument be made by telephone conference call or other electronic means. These proceedings shall be recorded.

(e) The hearing officer shall issue a written order deciding any motion, unless the motion is made during the course of the hearing on the merits while on the record. The hearing officer may request that the prevailing party prepare a proposed order.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

Subarticle 2. Issuance and Service of Citations

§ 60075.11. Determination of Class I Violations.

(a) A Class I violation includes: those violations that the state board has determined, based upon its enforcement discretion, to be of a nature that is clear cut, and less complex and serious, in terms of size, scope, and harm to the public and environment. Class I violations may cover:

(1) All violations arising pursuant to Health and Safety Code §§44011.6, et seq.

(2) Violations arising under Part 5, chapters 1 to 4 and chapter 6 of division 26 of the Health and Safety Code, or violations of any rule, regulation, permit, variance, or orders of the state board adopted or issued by the state board pursuant to the authority granted by those provisions of the Health and Safety Code.

~~(2) Violations of the statutes and regulations pertaining to the motor vehicle fuel requirements and standards that the state board has determined, based upon its enforcement discretion, to be of a nature that is clear cut, and less complex and serious, in terms of size, scope, and harm to the public and environment.~~

(3) Violations of regulations adopted and orders issued by the state board pursuant to authority granted under Parts 1 through 4 of division 26 of the Health and Safety Code.

(b) In determining whether violations are Class I violations under section (a)(2) and (a)(3), and the penalty levels of a citation, the state board shall consider factors, the civil penalty amounts prescribed by statute and all relevant circumstances surrounding the violation, the penalty criteria set forth in section 60075.39, supra, and the following: ,including, but not limited to:

- (1) The discernability of the violation;
- (2) The potential risk of injury to the public and environmental harm from such a violation;
- (3) Whether the violation is a single violation or has occurred in tandem with other violations;
- (4) The frequency and duration of the violation;
- (5) The time, effort, and expense required to correct the violation;
- (6) The cooperation of the citee in detecting and correcting the violation;
- (7) The compliance history of the citee;
- (8) Other factors as appropriate.

(c) The maximum civil penalty that may be proposed for each Class I violation, described in subparagraph (a)(2) and (a)(3) above, may not exceed the lesser of the maximum allowed by statute for a violation or \$5,000 per day for each day that a violation occurs. In addition, and the maximum cumulative penalty that may be proposed in any single citation may not exceed \$15,000. (See section 60075.39.) In determining the amount allowed by statute, the ARB shall use the method of calculation set forth in the underlying statute (e.g., HSC §43016 states that penalties shall be assessed on a per vehicle basis.)

(d) The state board shall not issue a citation for a Class I violation covered by section (a)(3) for any violation if the state board shares concurrent enforcement jurisdiction with a district and the district has commenced an enforcement action for that violation.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410,

43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.12. Issuance and Service of Citations.

(a) The ~~complainant~~ citing party may issue a citation to any person for Class I violations as defined in section 60075.11.

(b) A "Citation" shall include the following information:

- (1) The names of the alleged citees;
- (2) The code section, rule or regulation that has allegedly been violated;
- (3) A concise, but reasonably specific statement of the facts that support issuance of each alleged violation;
- (4) A proposed penalty for the alleged violations that is to be assessed against the citee as authorized by applicable law;
- (5) Reference to these procedures, notice that the procedures are available from the ARB hearing office (the address and phone number of which shall be set forth), and notice that Chapter 5 (commencing with section 11500) of the Government Code is not applicable to these proceedings;
- (6) Written notice to citee that he or she:
 - (A) May respond to the allegations of the citation and request a hearing. It shall also inform the citee of the consequences of failing to respond by the applicable deadline;
 - (B) Has the right to represent him or herself or to retain a representative, who is not required to be an attorney, at one's own expense; and
 - (C) If necessary, has the right to an interpreter.
- (7) The address of the office issuing the ~~complaint~~ citation; the address to which payment of the proposed penalty may be sent; and the address where of the ~~hearing office to whom~~ a request for a hearing shall may be filed if a citee so elects submitted.
- (8) A citation shall be served on the named citee by either personal or other form of service consistent with Code of Civil Procedure sections 415 through 417 or by certified mail, restricted delivery.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

Subarticle 3. Hearing Officers

§ 60075.13. Authority of Hearing Officers; Disqualification.

(a) In any matter subject to hearing pursuant to these rules, the hearing officer shall have the authority to do any act and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules, including, but not limited to, authority to hold prehearing and settlement conferences; conduct hearings to determine all issues of fact and law presented; to rule upon motions, requests and offers of proof, dispose of procedural requests, and issue all necessary orders; administer oaths and affirmations and take affidavits or declarations; to issue subpoenas and subpoenas duces tecum for the attendance of a person and production of testimony, books, documents, or other things; to compel the attendance of a person residing anywhere in the state; to rule on objections, privileges, defenses, and the receipt of relevant and material evidence; to call and examine a party or witness and introduce into the hearing record documentary or other evidence; to request a party at any time to state the respective position or supporting theory concerning any fact or issues in the proceeding; to certify official acts; to extend the submittal date of any proceeding; to hear and determine all issues of fact and law presented and to issue such interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter.

(b) The hearing officer or the executive officer, on a request for reconsideration, shall disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing. A hearing officer may not hear any case in which he or she has previously served as an investigator, prosecutor, or advocate. Any party may request disqualification by filing an affidavit or declaration under penalty of perjury. A request for disqualification of the hearing officer must be made no later than five days prior to the commencement to the first day of hearing on the merits of the case. A request for disqualification of the executive officer must be included in the request for reconsideration. The affidavit or declaration must state with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be respectively determined by either the hearing officer or the executive officer against whom the request for disqualification has been filed.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319

(1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11181-11182, 11425.30 and 11512, Government Code.

Subarticle 4. Ex Parte Communication.

§ 60075.14. Prohibited Communications.

(a) Except as otherwise provided in this section, while the proceeding is pending, the hearing officer shall not participate in any communications with any party, representative of a party, or any person who has a direct or indirect interest in the outcome of the proceeding about the subject matter or merits of the case at issue, without notice and opportunity of all parties, to participate in communication except a party that has been determined to be in default pursuant to section 60075.38.

(b) No pleading, letter, document, or other writing shall be filed in a proceeding under these rules by a party unless service of a copy thereof together with any exhibit or attachment is made on all other parties to a proceeding. Service shall be in a manner as prescribed in section 60075.4.

(c) For the purpose of this section, a proceeding is pending from the time that the petition for review of an executive officer decision is filed.

(d) Communications prohibited under paragraph (a) do not include communications concerning matters of procedure or practice, including requests for continuances that are not in controversy. It also does not prohibit communications between a party and the hearing officer when the opposing party has had a default entered pursuant to section 60075.38.

(e) A communication between a hearing officer and an employee of the state board that would otherwise be prohibited by this section is permissible if:

(1) The employee is another hearing officer or other employee of the hearing office whose job duties include aiding the hearing officer in carrying out the hearing officer's adjudicative responsibilities. Upon request, the hearing office will provide a list of employees of the hearing office to the parties.

(2) The employee of the state board has not served as an investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, or in any factually related proceedings, and the purpose of the communication is to assist and advise the hearing officer in determining whether a document is a confidential business record (i.e., trade secrets). In obtaining such assistance and advice, the hearing officer shall give notice to the parties of the person consulted and shall provide the parties with

as detailed a summary as possible of the substance of the advice received, while protecting the confidentiality of the business records at issue, and a reasonable opportunity to respond.

(3) The prohibitions of paragraph (a) that apply to the hearing officer shall also apply to all employees covered by subparagraphs (1) and (2) above.

(4) Communications permitted under subparagraphs (1) and (2) above shall not furnish, augment, diminish, or modify the evidence in the record.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, and 43031(a), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, and 43031(a), 43154, 43201, 43211, 43212 and 44011.6, Health and Safety Code; Sections 11430.70 - 11430.80, Government Code.

§ 60075.15. Disclosure of Communication.

(a) If, while the proceeding is pending, but before serving as hearing officer, the hearing officer receives a communication of a type that would be in violation of this subarticle if received while serving as hearing officer, he or she shall, promptly after starting to serve, disclose the content of the communication on the record and give all parties an opportunity to address it as provided below.

(b) If a hearing officer receives a communication in violation of this article, the hearing officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the hearing officer to the communication; and

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the hearing officer, and the identity of each person from whom the hearing officer received the communication.

(c) The hearing officer shall notify all parties that a communication described in this section has been made a part of the record.

(d) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The hearing officer has discretion to allow the party to present

evidence concerning the subject of the communication, including discretion to reopen a hearing that hearing having been concluded.

(e) Receipt of ex parte communications may be cause for disqualification of the hearing officer.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11340.1 - 11340.5, Government Code.

§ 60075.16. Applicability to Executive Officer.

(a) The provision of Subarticle 4 governing ex parte communications to the hearing officer also governs ex parte communications with the executive officer on matters that may come before him or her pursuant to Subarticle 11. Irrespective of the prohibitions of section 60075.13(a), the executive officer may consult with state board personnel who are not involved as an investigator, prosecutor, or advocate in the proceedings or preadjudicative proceedings of the matter before the executive officer, or in a factually related case, and whose job duties include assisting the executive officer in his or her adjudicative responsibilities.

(b) Except as otherwise provided in these procedures, while a proceeding is pending, the hearing officer shall have no communication, direct or indirect, with the executive officer on a matter that is under consideration.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11430.70 - 11430.80 Government Code.

Subarticle 5. Initiating Proceeding to Contest a Citation

§ 60075.17. Filing a Request for Hearing.

(a) Upon receiving a citation, the citee may:

(1) Initiate proceedings under these rules by filing a written request for hearing to contest a citation issued by the state board; or

(2) Pay the penalty demanded in the citation.

(b) A citee shall file a request for hearing to contest a citation with the executive officer.

(cb) For citations arising under section 44011.6 of the Health and Safety Code, the request for hearing shall be filed within 45 days of the citee's receipt of the citation by personal delivery or certified mail.

(de) For all other citations issued by the state board, the request for hearing shall be filed within 30 days of the citee's receipt of the citation by personal delivery or certified mail.

(ed) The executive officer ~~hearing officer~~ may extend the applicable filing period set forth in subparagraphs (b) and (c) for good cause.

(fe) If the citee fails to notify the executive officer ~~hearing office~~ of his or her intent to contest the citation within the applicable period set forth in subparagraphs (b) and (c), and if the citation penalty amount has not been paid in full, the citation becomes a final order not subject to review by any court or agency.

(gf) The request for hearing shall be deemed filed on the date the notice indicating a desire to contest the issued citation is delivered or mailed to, or if the date of delivery or mailing is not known, received by the hearing office. No particular format is necessary to institute the proceeding; however, the request shall include all of the information specified in section 60075.18 of these rules.

(hg) If the communication initiating the proceeding does not include the information required pursuant to section 60075.18, the executive officer ~~hearing office~~ shall immediately acknowledge receipt of the communication indicating the desire to request a hearing and shall notify the citee of the deficiencies in the submission which must be corrected before the request for hearing may be filed and docketed. The citee shall have 10 days from the date of mailing of the notice of deficiencies to submit a complete request for hearing; if the deficiencies are not corrected in the time provided the citation becomes final.

(ih) Upon timely receipt of a complete request for hearing, the executive officer ~~hearing office~~ shall notify the citee or its representative that a request for hearing has been deemed complete and shall assign the case and forward copies of all relevant documents, including copies of the citation and request for hearing to: a docket number to the proceeding, and shall notify the parties that the request for hearing has been filed and docketed.

(1) The Administrative Hearing Office of the state board if the citation has been issued pursuant to authority granted under Health and Safety Code sections

43028 and 44011.6.

(2) OAH if the citation has been issued pursuant to authority granted under Health and Safety Code sections 42410 and 43023.

(ii) Upon a showing of good cause, the executive officer or the hearing officer assigned to the case may allow the citee to amend the request for hearing after the deadline for filing has passed.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.18. Form of Request for Hearing.

(a) The request for hearing shall be signed by the citee or its designated representative and contain at least the following information: a reference to the citation being contested, including citation number and date of issuance; date of citee's receipt of the citation by personal delivery or certified mail; correct business address; a statement of the circumstances or arguments which are the basis of the request for hearing; identification of the facts the citee intends to place at issue; if applicable, the name and address of the designated representative; and identification of any other issues relating to the citation to be resolved in the proceeding.

(b) A separate request for hearing shall be filed for each citation contested.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.19. Issues for Hearing.

(a) The issues for hearing shall be limited to those raised by the citation and the docketed request for hearing.

(b) If a citation is classified as a repeat violation, ~~pursuant to section 2185, title 13, California Code of Regulations,~~ the validity of the earlier citation established by failure to request a hearing or the entry of a final disposition by the state board shall not be at issue. However, if the citation imposes a penalty pursuant to section 2185(a)(3), the staff of the state board shall be required to demonstrate the existence of the prior

citation or citations.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.20. Stays Pending Effect of Filing a Request for Hearing.

(a) The requirements to immediately correct deficiencies specified in a citation issued under section 44011.6(b) of the Health and Safety Code and to pay a civil penalty within 45 days of receipt of a citation (title Title 13, California Code of Regulations, section 2185) shall be stayed on timely receipt of a request for hearing until a final decision or order has been issued pursuant to section 60075.44 of these rules.

(b) For all other citations of noncompliance, if a cease and desist order has been issued, the hearing officer shall issue a stay pending issuance of a final decision, unless the hearing officer finds that the adverse effects of a stay on the public health, safety and welfare outweigh the harm to those persons directly affected by the lack of a stay. The hearing officer may conduct a hearing or request such submissions by the parties as necessary to obtain information to make a determination on this issue.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.21. Response by Citing Party.

(a) Within 20 days from the date ~~At the time that the executive officer hearing office deems a request for hearing filed under section 60075.17(h), and assigns the case to the appropriate the hearing office, may request that the citing party complainant may file a response to the issues raised by citee in its request for hearing. The citing party shall file the response with the hearing office assigned to hear the case and shall serve a copy of the response on the citee or its representative.~~

~~(b) If the complainant files a response, it shall be filed with the hearing office and served upon the citee within 20 days after receipt of notice of the filing of a request for hearing. The response shall contain the reasons and facts in support of the issuance of the citation and any other information specified in the notice of filing.~~

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and

44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

Subarticle 6. Resolution of Proceeding Without Hearing

§ 60075.22. Withdrawal of Request for Hearing.

(a) The request for hearing may be withdrawn by the citee by written request at any time before a decision is issued or by oral motion on the hearing record. The hearing officer shall grant such withdrawal by order or decision served on the parties.

(b) ~~If at the time that the The order or decision granting the motion to withdraw request is granted, effectively reinstates the citation.~~ If the time period for filing a request for hearing has passed, the citation shall be deemed a final order not subject to review by the state board or any court.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.23. Withdrawal of Citation.

(a) At anytime before the hearing officer issues a decision on the merits of the citation, ~~the citing party complainant~~ may withdraw the citation by written notice at any time or by oral motion on the hearing record.

(b) If a notice of withdrawal is issued prior to the hearing, the citing party ~~complainant~~ shall serve a copy of the notice of withdrawal on each party and on any authorized representatives.

(c) The notice of withdrawal or motion to withdraw a citation shall be accepted by the hearing officer and is a final order. A citation that ~~which~~ has been withdrawn may not be reinstituted.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.24. Settlement Agreements and Consent Orders.

(a) At any time before a final decision of the hearing officer, the citing party ~~complainant~~ and the citee may settle an action, in whole or in part, ~~by agreeing upon a civil penalty, with or without conditions, or other appropriate remedy.~~

(b) The parties may request the assistance of the hearing office in their attempts to settle the matters at issue. Upon receiving such a request, the hearing office may assign a settlement hearing officer, who is not the same hearing officer that has been assigned, to hear the merits of the case, unless the parties specifically request in writing the assignment of the latter hearing officer. For cases assigned to OAH, OAH may assign hearing officers from the state board to assist in settlement discussions.

(c) The parties shall memorialize any agreement in writing.

(d) The hearing officer assigned to hear the merits of the case, shall thereafter enter a consent order in accordance with the terms of the settlement agreement. Such consent order is not subject to further review by the agency or a court.

(e) If the filing of the consent order pursuant to paragraph (d) of this section or the settlement in the petition for review proceeding does not wholly conclude the action, the hearing officer assigned to hear the merits of the case shall promptly inform the parties of the schedule of the remaining proceedings.

(f) Unless the parties have otherwise consented to use the hearing officer assigned to hear the merits of the case in settlement discussions, settlement discussions or offers of compromise regarding unresolved issues shall not be discussed with that hearing officer. Settlement discussions or offers of compromise shall also not be made part of the record of the proceedings.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 11415.60, Government Code.

§ 60075.25. Motions for Summary Determination of Issues

(a) Any party may file a motion for summary judgment or summary adjudication of the issues. Such motions shall include supporting legal argument and, where necessary, affidavits showing that there is no genuine issue of material fact for determination regarding the identified issues. A party opposing such a motion shall

show by affidavit or other documentation that a genuine issue of material fact as to the issues raised exists. After reviewing the motion and response of the parties, the administrative record, and any arguments of the parties, the hearing officer shall determine whether a genuine issue of material fact as to the issues exists and whether a party is entitled to judgment as to liability as a matter of law.

(b) If, upon considering a motion under subparagraph (c), the hearing officer determines that a party is entitled to summary judgment as to liability as a matter of law, the hearing officer shall issue a written order or decision that sets forth necessary findings of fact and conclusions of law regarding all matters that were at issue. If the decision finds liability, the hearing officer shall follow the penalty assessment criteria set forth in section 60075.39.

(c) Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the hearing officer may deny the motion, or grant a continuance to permit affidavits to be obtained, or to permit discovery as provided under these procedures.

(d) The hearing officer shall deny a request for summary determination of liability if he or she finds the administrative record, including any evidence presented by the parties as part of this motion, present a genuine issue of material fact. If the hearing officer denies a request for summary determination, or denies such a request in part, the hearing officer shall promptly issue to each party a written ruling as to the existence of a genuine issue of material fact as to liability and the reasons for the ruling. The matter shall continue to be set for hearing on all issues for which a genuine issue of material fact exists.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and 44011.6, Health and Safety Code.

Subarticle 7. Discovery and Subpoenas and Subpoenas Duces Tecum

§ 60075.26. Discovery

(a) Exclusivity of Discovery Provisions.

The provisions of this section provide the exclusive right to, and method of, discovery as to any proceeding governed by this chapter.

(b) Document Exchange.

(1) After initiation of a proceeding, a party, upon written request made to another party is entitled, prior to the hearing, to inspect and make a copy of any document, thing, statement or other writing relevant to the issues for hearing which is in the control of the other party and which is relevant and would be admissible in evidence, including, but not limited to, any statements of parties or witnesses relating to the subject matter of the proceeding, all writings or things which the party then proposes to offer in evidence, and any inspection or investigative reports prepared by or on behalf of any party.

(3) The parties shall exchange the requested information at a time mutually agreed to by the parties, or if no agreement has been reached, no later than 30 days after a request has been made. Documents shall be served upon the requesting party pursuant to section 60075.4(b).

(4) Unless other arrangements are made, the party making the request shall pay the reasonable costs of copying the requested materials.

(5) A party claiming that certain writings or things are privileged against disclosure shall serve on the requesting party a written statement setting forth what matters are claimed to be privileged and the reasons therefore.

(c) Identity of Witnesses and Exhibits

(1) No later than 10 days before the scheduled hearing date, the parties shall submit to the hearing office and serve upon the other parties:

(A) A list of the names, addresses and qualifications of proposed witnesses and a brief summary of the testimony to be presented by each witness; and

(B) Each document or other exhibit, the party expects to offer or may offer, if the need arises, into evidence.

(2) The hearing officer may prohibit any party from presenting any witness or exhibit that has not been included on that party's witness list or in submitted exhibits as required under paragraph (c)(1) of this section.

(d) Depositions.

(1) Unless otherwise stipulated to by the parties, depositions shall be limited to the following:

(A) A party may petition the hearing office to request that it be allowed to take the testimony of a material witness who is either unable to attend or

cannot be compelled to attend a hearing on the merits may be obtained by deposition in the manner prescribed by law for depositions in civil actions;

(B) The petition shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable or cannot be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose;

(C) The petitioner shall serve notice of the deposition and a copy of the petition on the other parties at least 10 days before the date set for the deposition.

(2) Where the witness resides outside of the state and where the hearing officer has ordered the taking of the testimony by deposition, the hearing officer shall obtain an order of court to that effect by filing a petition in the superior court in Sacramento County. The proceedings for such a hearing shall be in accordance with the provisions of Government Code section 11189.

(e) Protective Orders:

(1) Upon motion by a party or by the person from whom discovery is sought, or by the hearing officer on his or her own motion, the hearing officer may enter a protective order with respect to this material.

(2) Prior to granting a protective order, it must be established by the moving party that the information sought to be protected is entitled to be treated as a trade secret or is otherwise confidential. A party or person seeking a protective order shall have the opportunity to be heard on all issues relevant to preserving the record's confidentiality, including, but not limited to, the following:

(A) The appropriate scope and terms of any governing protective order;

(B) The terms under which the record may be placed in evidence or otherwise used at a hearing; and

(C) The disposition of the record and any copies thereof after all relevant administrative and judicial proceedings have concluded.

(3) A party or person seeking a protective order may be permitted to make all or part of the required showing in a meeting closed to the public. The hearing officer shall have discretion to limit attendance at any closed meeting to the hearing officer and the person or party seeking the protective order.

(4) If granted, the protective order may order that the trade secret information not be disclosed or that it be disclosed only to specified persons, or in a specified way. Disclosure may be limited to counsel for the parties who shall not disclose such information to the parties themselves. Disclosure to specified persons shall be conditioned on execution of sworn statements that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order.

(5) The protective order shall contain terms governing the treatment of the information which are appropriate under the circumstances to prevent disclosure outside the hearing; the order may require that the material be kept under seal and filed separately from other evidence and exhibits in the hearing.

(6) Any party subject to the terms and conditions of any protective order, desiring to make use of any documents or testimony covered by the protective order, shall file a motion to the hearing officer and set forth justification for the request. The motion shall be granted upon a demonstration of good cause that the information is relevant and has significant probative value on a disputed issue of material fact in issue. In granting the motion, the hearing officer shall enter an order protecting the rights of the affected persons and parties, who have claimed that the information is confidential, by preventing any unnecessary disclosure of the information. The hearing officer may require that the information be presented in a closed meeting, with attendance limited, as necessary and practicable, to specified representatives of the parties.

(7) The hearing officer shall make a record of all closed meetings that are ordered under this section. The record shall be sealed and made available, upon appropriate order, to the executive officer, on reconsideration, or to the court on review.

(8) If the hearing officer denies a motion for protective order or grants a protective order only in part, the order shall not become effective until 10 days after the date the order is served. In the interim, a party to the proceeding or third-party holder of the asserted confidential information adversely affected by the order may seek appropriate interlocutory relief in a court of competent jurisdiction.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11185, 11191 and 11511, Government Code.

§ 60075.27. Proceeding to Compel Discovery.

(a) Any party claiming that its request for discovery pursuant to this section has not been complied with or that the opposing party has failed to comply with a stipulated agreement to provide discovery may serve and file with the hearing officer a motion to compel the party who has refused or failed to produce the requested or stipulated discovery to comply. The motion shall state facts showing the party has failed or refused to comply with a discovery request or stipulation, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable, that a reasonable and good faith attempt to contact the noncomplying party for an informal resolution of the issue has been made, and the grounds of the noncomplying party's refusal so far as known to the moving party.

(b) The motion shall be filed within 15 days after the date the requested materials were to be made available for inspection and copying or the date a deposition was scheduled to take place and served upon the party who has failed or refused to provide discovery.

(c) The hearing on the motion to compel discovery shall be held within 15 days after the motion is filed, or a later time that the hearing officer may on his or her own motion for good cause determine. The party who has refused or failed to provide discovery shall have the right to serve and file a written answer or other response which shall be due at the hearing office and personally served on all parties at least three days prior to the date set for hearing.

(d) Where the matter sought to be discovered is under the custody or control of the party who has refused or failed to provide discovery and that party asserts that the matter is not a discoverable matter under this section, or is privileged against disclosure, the hearing officer may order that the party in custody lodge with the hearing office the matters identified in subdivision (b) of section 915 of the Evidence Code and the hearing officer shall examine the matters in accordance with those provisions.

(e) The hearing officer shall decide the case on the matters examined in a closed meeting, the papers filed by the parties, and such oral argument and additional evidence as the hearing officer may allow.

(f) Unless otherwise stipulated by the parties, the hearing officer shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover. The hearing office shall serve a copy of the order by mail upon the parties. Where the order grants the motion in whole or in part, the order shall not become effective until 10 days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.

(g) If after receipt of an order directing compliance with the provisions of these rules regarding discovery, a party fails, without good cause, to comply with the order,

the hearing officer may draw adverse inferences against that party and may prevent that party from introducing any evidence that had been requested and not produced during discovery into the administrative record.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11186 - 11188 and 11507.7, Government Code.

§60075.28. Subpoena and Subpoena Duces Tecum.

(a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.

(b) At the request of a party, subpoenas and subpoenas duces tecum shall be issued by the hearing officer assigned to a proceeding; or the general counsel or executive officer of the citing party complainant; or, if represented by an attorney, the attorney of record for a party in accordance with sections 1985-1985.4 of the California Code of Civil Procedure.

(c) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with section 1561 of the Evidence Code.

(d) The process extends to all parts of the state and shall be served in accordance with sections 1987 and 1988 of the California Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(e) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(f) Upon timely motion of a party or witness, or upon his or her own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the hearing officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the hearing officer may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.

(g) The state board may quash a subpoena or a subpoena duces tecum that it has issued on its own motion.

(h)(1) In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the representative of the party or person.

(2) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in section 1987 of the California Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

(i) A witness other than an employee of the state or a political subdivision thereof appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive the same mileage, and appearance fees allowed by law; such fees are to be paid by the party at whose request the witness is subpoenaed.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11186 - 11188, 11450.05 - 11450.30, Government Code; Section 1561, Evidence Code, Sections 1985 - 1985.4, 1987 and 1988, California Code of Civil Procedure.

Subarticle 8. Contempt and Sanction Orders

§ 60075.29. Contempt.

(a) If any person in proceedings before the hearing officer disobeys or resists any lawful order or refuses to respond to a subpoena, subpoena duces tecum, or refuses to take the oath or affirmation as a witness or thereafter refuses to be

examined, or is guilty of misconduct during a hearing or in its immediate vicinity as to obstruct the proceedings, the hearing officer may certify the facts to the Superior Court in and for the county where the proceedings are held for contempt proceedings pursuant to Government Code sections 11455.20, and 11186 through 11188.

(b) Notwithstanding the above, the hearing officer may order a party, a party's representative or both, to pay reasonable expenses, including authorized representation fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions; the failure to comply with a discovery request or subpoena; or the failure to comply with a lawful order of the hearing officer.

(2) "Frivolous" means:

(A) Totally and completely without merit, or

(B) For the sole purpose of harassing an opposing party.

(c) An order for sanctions may be oral, on the record, or in writing and shall set forth the factual findings which are the basis for the imposition of sanctions.

(1) In determining reasonable expenses, the party or parties to whom payment is to be made shall, at the hearing officer's discretion, either make a statement on the record under oath or submit a written declaration under penalty of perjury setting forth with specificity the expenses incurred as a result of the other party's conduct.

(2) Within 5 days of the receipt of the hearing officer's order for the payment of expenses, a party or representative may, on grounds of hardship, request reconsideration from the hearing officer issuing the order. The request for reconsideration shall be filed in writing, and include a declaration under penalty of perjury.

(d) The order or denial of an order to pay expenses under paragraph (b) is subject of procedural review in the same manner as a final decision pursuant to Subarticle 12.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 11525, Government Code.

Subarticle 9. Hearings

§ 60075.30. Time and Place of Hearing.

(a) Within 30 days of the executive officer deeming the request for hearing complete and assigning the case to the appropriate hearing office, ~~serving the notice of filing to the citee~~, the hearing office shall schedule the hearing date. A matter shall be scheduled to be heard as soon as practicable, but no later than 90 days after assignment of the case to the hearing office. ~~a request for hearing has been filed~~.

(b) The hearing office shall deliver or mail a notice of hearing to all parties at least 30 days prior to the hearing. The notice shall be in the form specified in section 11509 of the Government Code.

(c) The hearing officer may, on his or her own motion or upon request of any party accompanied by a showing of good cause, grant such delays or continue a hearing to another time or place as may be necessary or desirable in the interest of fairly resolving the case.

(1) A party shall apply to the hearing officer for a continuance not less than 5 days prior to the scheduled hearing.

(2) When a continuance is ordered during a hearing, the hearing officer shall give written notice of the time and place of the continued hearing.

(d) The hearing office shall set the place of hearing at a location as near as practicable to the place where the citee resides or maintains a place of business in California. If the citee does not reside or maintain a place of business in California, the hearing shall be in Sacramento. The hearing office may establish hearing locations anywhere in the state; at a minimum one hearing location shall be established in Sacramento and one in the Los Angeles area.

(e) Upon the motion of any party and a showing of good cause, or upon the motion of the hearing officer, and in the absence of an objection from any party, the hearing officer may exercise discretion to conduct all or part of a hearing by telephone or other electronic means.

(1) In granting such a motion, the hearing officer must be assured that each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe all exhibits fully.

(2) The hearing officer may direct the party who has requested the alternative method to make the necessary arrangements and be responsible for any associated costs.

NOTE: Authority cited: Sections 39600, 39601, 43028, 42410, 43023, 43031(a) and

44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Sections 11509 and 11440.30, Government Code.

§ 60075.31. Consolidation and Separation of Cases.

(a) The hearing officer may consolidate for hearing and decision any number of proceedings involving the same citee.

(b) Upon motion of a party or upon his or her own motion, the hearing officer may consolidate for hearing and decision any number of proceedings involving common issues of law or fact where consolidation would expedite and simplify consideration of the issues and would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(c) Upon the motion of a party or upon the hearing officer's own motion, the hearing officer may, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 11505.3, Government Code.

§ 60075.32. Failure to Appear.

(a) If after service of a notice of hearing, including notice of consolidated hearing or continuance, a party fails to appear at a hearing either in person or by representative, the hearing officer may take the proceeding off calendar, or may, at the request of a party or on his or her own motion, issue a default order in accordance with section 60075.38 of these rules.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.33. Conduct of Hearing.

(a) The hearing shall be presided over by a hearing officer and shall be conducted in the English language.

(b) The hearing officer shall conduct a fair and impartial hearing in which each party has a reasonable opportunity to be heard and to present evidence.

(c) Each party to the proceeding shall have these rights: To call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations; to impeach any witness regardless of which party first called the witness to testify; and to rebut the opposing evidence against him. If a party does not testify on his or her behalf, the party may be called and examined as if under cross-examination.

(d) The citing party complainant shall present the citation and the evidence supporting its issuance, and any other material that is pertinent to the issue to be determined by the hearing officer. The citee has the right to examine, respond to, or rebut the citation and any proffered evidence and material. The citee may offer any documents, testimony, or other exculpatory evidence which bears on appropriate issues, or may be relevant to the penalty amount.

(e) At the close of citee's presentation of evidence, the parties respectively have the right to introduce rebuttal evidence that is necessary to resolve disputed issues of material fact, subject to any limits imposed by the hearing officer pursuant to subparagraph (f)(1) below.

(f) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(g) The hearing officer may:

(1) Limit the number of witnesses and the scope and extent of any direct examination, cross-examination, or rebuttal testimony, as necessary, to protect the interests of justice and conduct a reasonably expeditious hearing;

(2) Require the authentication of any written exhibit or statement; and

(3) Call and examine a party or witness and may, on his or her own motion, admit any relevant and material evidence.

(4) Exclude persons whose conduct impedes the orderly conduct of the hearing;

(5) Restrict attendance because of the physical limitations of the hearing facility; or

(6) Take other action to promote due process or the orderly conduct of the hearing.

(h) The taking of evidence in a hearing shall be controlled by the hearing officer in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the hearing officer shall define the issues and the order in which evidence will be received.

(i) Hearings shall be recorded electronically. The recording made by the Administrative Hearing Office shall be the official recording of the hearing.

(1) The hearing office will not normally prepare a verbatim transcript of the official recording, but the hearing officer may order one if deemed necessary to permit a full and fair review and resolution of the case. If not so ordered, a party may, at its own expense, request that a verbatim transcript be made. The party making the request shall provide one (1) copy to the hearing office and one (1) copy to the other party.

(2) The official recording of the hearing and transcript of the recording, together with all written submissions made by the parties, shall become part of the administrative record for the proceeding.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.34. Evidence.

(a) Testimony shall be taken only under oath or affirmation.

(b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. The hearing officer shall admit evidence which is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions, and which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The application of these rules shall not affect the substantial rights of the parties as provided in the Evidence Code.

(c) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(d) Consistent with the provisions of section 60075.26(e), trade secret and other confidential information may be introduced into evidence. The hearing officer shall take all precautions to preserve the confidentiality of such information, and may make such orders as may be necessary to consider such evidence in a closed meeting, including the use of a supplemental order or decision to address matters which arise out of that portion of the evidence which is confidential, and other confidential information may be introduced into evidence.

(e) The hearing officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or unduly prejudices the other party.

(f) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the state board's area of expertise, and determinations, rulings, orders, findings and decisions, required by law to be made by the state board or the hearing officer.

(1) The hearing officer shall take official notice of those matters set forth in section 451 of the Evidence Code.

(2) The hearing officer may take official notice of those matters set forth in section 452 of the Evidence Code.

(3) Each party shall give notice of a request to take official notice and be given reasonable opportunity on request to present information relevant to:

(A) The propriety of taking official notice, and

(B) The effect of the matter to be noticed.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 451, 452, Evidence Code.

§ 60075.35. Evidence by Affidavit or Declaration.

(a) At any time 20 or more days prior to a hearing or a continued hearing, a party may mail or deliver to the opposing party or parties a copy of any affidavit or declaration

which the proponent proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless an opposing party, within 7 days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine the affiant or declarant the opposing party's right to cross-examine such affiant or declarant is waived and the affidavit or declaration, if introduced in evidence, shall be given the same effect as if the affiant or declarant had testified orally. If an opportunity to cross-examine an affiant or declarant is not afforded after request therefore is made as herein provided, the hearing officer may allow the affidavit or declaration to be introduced into evidence, but if so allowed, it shall only be given the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be a separate document concurrently served with the affidavit or declaration, entitled "Notice of Intent to Use Declaration or Affidavit in Lieu of Oral Testimony." The title shall be in bold print. The content of the notice shall be substantially in the following form:

"The accompanying affidavit or declaration of [insert name of affiant or declarant] will be introduced as evidence at the hearing in [insert title and docket number or petition number of proceeding]. [Insert name] will not be called to testify orally and you will not be entitled to question the affiant or declarant unless you notify [insert name of the proponent, representative, agent or attorney] at [insert address] that you wish to cross-examine the affiant or declarant. To be effective, your request must be mailed or delivered to [insert name of proponent, representative, agent or attorney] on or before [insert a date 7 days after the date of mailing or delivery of the affidavit or declaration to the opposing party]."

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.36. Exclusion of Witnesses.

(a) Upon motion of a party, the hearing officer may exclude from the hearing room any witnesses, other than the parties themselves or their representatives, not at the time under examination.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.37. Oral Argument and Briefs.

(a) Prior to the close of the hearing, the hearing officer may, on his or her own motion or upon motion of a party, grant oral argument.

(b) Motions to submit written argument shall be made prior to the close of the hearing and shall be granted at the discretion of the hearing officer upon a determination that written argument will be productive and will not unreasonably delay the disposition of the proceeding. If granted, a party shall file written argument within 15 working days from the date of the hearing. Opposing parties may file an answer within 10 working days from service of the argument. The hearing officer may extend or reduce the above filing dates for submission of written argument for good cause.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

Subarticle 10. Decisions After Hearing

§ 60075.38. Default Order.

(a) A party to a case that has been assigned for hearing pursuant to section 60075.17(i) may be found to be in default upon failure to appear at a scheduled hearing without good cause.

(1) No finding of default shall be made against the citee unless the staff of the state board presents sufficient evidence to establish a prima facie showing that the citation was properly issued and the penalty appropriate.

(2) Default by the citing party ~~complainant~~ shall result in dismissal of the citation with prejudice.

(b) If a default against a citee in ~~a complaint proceeding~~ occurs, the state board, within 10 days, shall present written evidence supported by affidavits or declarations, substantiating the proposed penalty set forth in the complaint.

(c) If the hearing officer determines that a default has occurred, he or she shall issue a default order against the defaulting party. ~~Except as provided in section 60075.17(e),~~ This order shall constitute a decision or order after hearing for purposes of section 60075.40 of these rules.

(d) Any proceeding may be reinstated by the hearing officer upon a showing of

good cause that contains sufficient facts to show or establish a reasonable basis for the failure to appear at the hearing. ~~The request for reinstatement shall be made by the~~ The defaulting party shall make the request for reinstatement within ~~30~~ 10 days of service of the default order pursuant to section 60075.38(d) of these rules.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.39. Penalty Assessment Criteria.

(a) For citations issued under Health and Safety Code section 44011.6 and the regulation adopted pursuant thereto, ~~Title title~~ 13, California Code of Regulations, sections 2180, et seq., the hearing officer shall follow the penalty schedule outlined in ~~Title title~~ 13, CCR, section 2185.

(b) In determining penalties for citations issued under Health and Safety Code sections 43023 and 43028, the hearing officer shall consider all relevant circumstances, including, but not limited to:

(1) The penalties or range of penalties set forth in the underlying rules or regulations that have been violated;

(24) The extent of harm caused by the violation to public health and safety and to the environment;

(32) The nature and persistence of the violation, including the magnitude of the excess emissions;

(43) The compliance history of the citee, including the frequency of past violations;

(54) The preventive efforts taken by citee, including the record of maintenance and any program to ensure compliance;

(65) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods;

(76) The efforts to attain, or provide for, compliance;

(87) The cooperation of the citee during the course of the investigation

and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation; and

(98) For the person who owns a single retail service station, the size of the business.

(c) In determining penalties for citations issued under Health and Safety Code section 42410, the hearing officer shall consider all relevant circumstances, including, but not limited to:

(1) The penalties or range of penalties set forth in the underlying rules or regulations that have been violated;

(2) The extent of harm caused by the violation;

(3) The nature and persistence of the violation;

(4) The length of time over which the violation occurs;

(5) The frequency of past violations;

(6) The record of maintenance;

(7) The unproven or innovative nature of the control equipment;

(8) Any action taken by the respondent, including the nature, extent, and time or response of the cleanup and construction undertaken, to mitigate the violation; and

(9) The financial burden to the respondent.

NOTE: Authority cited: Sections 39600, 39601, 42410(f), 43203(f), 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42403, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.40. Decision or Order After Hearing; Correction of Mistakes or Errors; Effective Date of Decision.

(a) Unless otherwise ordered, all proceedings shall be submitted at the close of the hearing. The hearing officer may extend the submission date and shall, within 30 days after the proceeding is submitted, make findings upon all facts relevant to the issues for hearing, and file an order or decision with the reasons or grounds upon which the order or decision was made.

(b) The order or decision shall be in writing, signed and dated by the hearing officer deciding the proceeding.

(c) The order or decision may, based on the findings of fact, affirm, modify or vacate the citation or penalty, or direct other relief as appropriate.

(d) A copy of the order or decision shall be served on each party or representative together with a statement informing the parties of their right to request that the executive officer reconsider the order or decision pursuant to sections 60075.43, et seq. of these rules.

(e) (1) Within five days of the filing of any order or decision, the hearing officer may, at the request of any party or on his or her own motion, on the basis of mistake of law or fact, issue a modified order or decision correcting a mistake or error with respect to any matters determined or covered by the previously issued order or decision. If necessary, the hearing officer may schedule further proceedings to address the issue(s).

(2) If a request has been filed under this subparagraph, the request shall be deemed denied if the hearing officer has taken no action to address the request within 15 days of filing of the request.

(3) The hearing office shall serve a copy of the modified order or decision on each party that had previously been served with the original order or decision. The modified order or decision shall supersede the previously served order or decision, and the date of service of the modified order or decision shall be the effective date of the decision and order for purposes of sections 60075.41 and 60075.44.

(f) The hearing officer shall certify the administrative record and shall make available copies of the administrative record and any issued orders or decisions to the executive officer.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and 44011.6, Health and Safety Code.

Subarticle 11. Reconsideration by the Executive Officer

§ 60075.41. Reconsideration; On Motion of Executive Officer or by Request of Party.

(a) At any time within 20 days of the filing of an order or decision of the hearing officer, pursuant to section 60075.40 of these rules, the executive officer may, on his or her own motion, determine that reconsideration is appropriate with respect to any matters determined or covered by the order or decision of the hearing officer. The executive officer shall notify the parties and the hearing office of his or her determination.

(b) A party aggrieved by an order or decision of the hearing officer, pursuant to section 60075.40 of these rules, may, within 20 days of service of such order or decision, request that the executive officer reconsider any matters determined or covered by the order or decision. The request for reconsideration shall be filed with the executive officer and shall be served on all parties in accordance with section 60075.4 of these rules, except that the original of the request shall be filed with the executive officer, and the hearing office shall receive a copy. The request shall be deemed filed the date it is delivered or mailed to the executive officer.

Note: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.42 Reconsideration; Procedural Requirements.

(a) The request for reconsideration shall be signed by the party filing the request or its representative and verified upon oath. The request may only request reconsideration of issues that were raised before the hearing officer and may only be based upon one or more of the following grounds:

(1) In issuing the order or decision, the hearing officer acted without or in excess of his or her powers;

(2) The order or decision was procured by fraud;

(3) The evidence received by the hearing officer does not justify the findings of fact;

(4) The petitioner has discovered new material evidence which the petitioner could not, with reasonable diligence, have discovered and produced at the hearing;

(5) The findings of fact do not support the order or decision; and

(6) The order or decision is contrary to applicable law.

(b) (1) Any request for reconsideration shall set forth specifically and in full detail the grounds upon which the party making the request considers the order or decision to be unjust or unlawful and every issue to be considered by the executive officer on reconsideration. The party making the request shall be deemed to have waived all objections, irregularities, and illegalities concerning the proceeding upon which reconsideration is sought other than those specifically set forth in the petition for reconsideration.

(2) The petition for reconsideration will be denied if it contains no more than allegations of the statutory or constitutional grounds for reconsideration, unsupported by specific references to the record and principles of law involved.

(c) When a request for reconsideration or answer thereto has been timely filed, the filing of supplemental requests or answers in response may be granted at the discretion of the executive officer. Parties requesting a copy of the hearing record shall bear the cost of reproduction.

(d) The request for reconsideration may include, and the executive officer may grant, a request that the decision of the hearing officer be stayed pending resolution of the petition for reconsideration.

(e) Within 10 days of being served with notice of a request for reconsideration, a party opposed to the request may file an opposition to the request with the executive officer or the state board secretary, as applicable. The opposition shall be signed and verified under oath by the party or its representative and shall not exceed 6 pages.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

§ 60075.43. Reconsideration; Orders and Decisions by the Executive Officer.

(a) Unless the executive officer expressly finds otherwise, a request for reconsideration shall be deemed summarily denied if the executive officer does not issue a finding that reconsideration is warranted within 20 days of filing of the request. For those matters deemed summarily denied, the order or decision of the hearing officer issued pursuant to section 60075.40 shall be considered final pursuant to section 60075.44.

(b) If the request for reconsideration has not been summarily denied pursuant to

subparagraph (a) above in reconsidering the decision or order of the hearing officer, the executive officer may:

- (1) Review some, but not all, issues raised by the request;
- (2) Grant an order to stay, suspend, or postpone, the order or decision of the hearing officer, findings, or decision after reconsideration;
- (3) Affirm, rescind, or amend the findings, order or decision of the hearing officer; or
- (4) Direct the reopening of the hearing for the taking of additional evidence and issuance of supplementary findings of fact. The executive officer may direct that the taking of such evidence be done by either written submission or further testimony under oath before the executive officer or a hearing officer. The hearing shall be reopened for the limited purposes identified by the executive officer in his order. Notice of the time and place of further hearings shall be given to all parties and to such other persons as the hearing officer may direct.

(c) For those decisions and orders of the hearing officer for which reconsideration is undertaken, the executive officer shall issue his or her final disposition of the request as expeditiously as possible. A decision or order that is the final disposition of the request for reconsideration shall be in writing and any modifications to the order or decision of the hearing officer shall be supported with additional findings, facts and conclusions of law.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: Mathews v. Eldridge, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

Subarticle 12. Final Orders and Decisions

§ 60075.44. Final Order or Decision; Effective Date.

(a) Pursuant to sections 60075.17 and 60075.22(b), if a citee fails to request a hearing to contest the issuance of a citation within the time period provided, the citation becomes a final order and the stated penalty due and payable.

(b) If no request for reconsideration of the order or decision of the hearing officer has been filed within 20 days of the service of an order or decision under section 60075.41(b) of these rules, and if the executive officer, on his or her own motion, has not issued a finding that reconsideration is appropriate under section 60075.41(a), the order or decision of the hearing officer shall become final. The effective date of the final decision or order shall be 30 days after the date the order or decision of the

hearing officer was served by mail on the parties.

(c) If a party has filed a request for reconsideration and it has been deemed summarily denied pursuant to section 60075.43(a), because the executive officer has not acted upon the request within the time provided, the order or decision of the hearing officer shall become final. The effective date of the hearing officer order or decision becoming final shall be 20 days from the date that the request for reconsideration was filed.

(d) If the executive officer issues a finding that reconsideration is warranted, the order or decision of the executive officer providing full disposition of the request for reconsideration pursuant to 60075.44(b) shall be the final order or decision and shall become effective on the date that it is served by mail on the parties.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319 (1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code.

Subarticle 13. Judicial Review

§ 60075.45. Judicial Review.

(a) Except for orders that have become final because a citee has failed to request a hearing to contest a citation (see sections 60075.17, 60075.22(b) and 60075.44(a)), a party may seek judicial review of a final order or decision by administrative mandamus pursuant to section 1094.5 of the Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the agency.

(1) For citations arising under section 44011.6 of the Health and Safety Code, the citee may file for judicial review within 60 days from the date the order or decision becomes final under section 60075.44.

(2) For all citations issued under sections 42410, 43023, and 43028 of the Health and Safety Code, the respondent may file for judicial review within 30 days from the date the order or decision becomes final under section 60075.44.

(b) The state board may seek to enforce a final order in accordance with applicable law or decision in Superior Court.

NOTE: Authority cited: Sections 39600, 39601, 42410, 43023, 43028, 43031(a) and 44011.6(m), Health and Safety Code. Reference: *Mathews v. Eldridge*, 424 U.S. 319

(1976); Sections 39674, 42401, 42402, 42402.1, 42402.2, 42402.3, 43008.6, 42410, 43012, 43016, 43021, 43023, 43026, 43027, 43028, 43029, 43030, 43031(a), and 43154, 43201, 43211, 43212 and, 44011.6, Health and Safety Code; Section 1094.5, Code of Civil Procedure.

Attachment C

SENATE BILL (SB) 527

1060

Senate Bill No. 527

CHAPTER 769

An act to amend Sections 42400.4, 42801, 42810, 42821, 42822, 42823, 42824, 42840, 42841, 42842, 42843, 42860, 42870, and 43021, and to add Sections 42410, 42801.1, and 43023 to, the Health and Safety Code, relating to air pollution.

[Approved by Governor October 11, 2001. Filed
with Secretary of State October 12, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

SB 527, Sher. Air pollution.

(1) Existing law prescribes various civil penalties that may be imposed by the State Air Resources Board for a violation of specified state board regulations relating to vehicular and nonvehicular air pollution control. Existing law also authorizes any city attorney, with the consent of the district attorney, upon the complaint of the state board, to bring an action for unfair trade practices.

This bill would authorize the state board to impose administrative penalties as an alternative to seeking civil penalties for certain violations. The bill would authorize the state board to impose an administrative penalty up to the maximum amount the state board is authorized to impose as a civil penalty for that violation. The bill would also limit the state board's authority to impose an administrative penalty to a maximum of \$10,000 per day in which there is a violation not to exceed \$100,000 per penalty assessment proceeding for any violation arising from the same conduct. The bill would also provide for administrative review under existing state board administrative hearing procedure regulations, except that this bill would require that the hearings be conducted by an administrative law judge appointed by the Office of Administrative Hearings. The bill would also provide for judicial review of an administrative hearing in conformance with existing law. The bill would also prohibit the state board from causing an action to be brought by any city attorney against any person upon whom the state board has imposed an administrative penalty.

(2) Existing law requires the Secretary of the Resources Agency to establish the California Climate Action Registry as a public benefit nonprofit corporation, governed by a prescribed board of directors, that is required to record and register voluntary greenhouse gas emission reductions made by California entities after 1990.

This bill would define the terms, “annual emissions results,” “baseline,” “certification,” “de minimis emissions,” “emissions,” “emissions inventory,” and “material” for purposes of those provisions governing the registry.

Existing law also requires the registry to perform various functions, including, among other things, adopting standards for verifying emissions reductions, adopting a list of approved auditors that would verify emissions reductions, establishing emissions reductions goals, designing and implementing efficiency improvement plans, maintaining a record of all emissions baselines and reductions, and recognizing, publicizing, and promoting entities that participate in the registry.

This bill would revise the functions and duties of the registry, as prescribed, and would require the registry, in coordination with the State Energy Resources Conservation and Development Commission, to adopt industry-specific reporting metrics at one or more public meetings.

Existing law requires participants in the registry to report emissions baselines and annual emissions results expressed by a fraction in terms of emissions efficiency rates, as prescribed, and to adopt guidelines encouraging participants to report emissions in relation to the annual average business as usual rate of improvement in the energy efficiency of the state economy, as determined by the commission.

This bill would delete those requirements, and would require participants to report direct or indirect emissions separately, and would authorize the registry, on or after January 1, 2004, in coordination with the commission, to revise the scope of indirect emission source types that participants may be required to report, after a public workshop and review process, if the commission approves that revision at a public hearing, and makes specified determinations. The bill would specify that participants shall not be required to report emissions of any greenhouse gas that is de minimis, as defined, in quantity, when summed across all applicable sources of the participating entity.

The bill would prescribe certain requirements for the registration and certification of a participant in the registry.

Existing law requires the registry, not later than July 1, 2003, and periodically thereafter, to report to the Governor and the Legislature on the number of organizations participating in the registry, the percentage of the state’s emissions represented by the participants in the registry, and the reductions in greenhouse gas emissions achieved by those participants.

This bill would additionally require the registry to report to the Governor and the Legislature on ways to make the registry more

workable for participants that are consistent with the goals and intent of the registry. The bill would make various other changes with respect to the functions and obligations of the registry, as prescribed.

(3) Existing law also prescribes criminal penalties for a violation of a federally enforceable operating permit issued pursuant to specified provisions of the federal Clean Air Act or for a violation of specified laws under that act relating to stationary sources. Under existing law, the recovery of civil penalties for a violation of specified state laws relating to nonvehicular emission limitations precludes criminal prosecution for the violations under the act. Other existing law, as of January 1, 2003, makes a person who transports, or who provides a vehicle to transport, motor vehicle fuel for a motor vehicle fuel distributor who is not in compliance with specified laws, liable for a civil penalty.

This bill would correct erroneous cross-references and delete an obsolete cross-reference in those provisions.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in the enactment of this act to do all of the following:

(a) Provide the State Air Resources Board with an alternative to pursuing civil penalties through the court system by allowing the state board to pursue penalties for less significant violations through an administrative hearing process.

(b) Provide administrative penalty authority only for those categories of violations for which the state board maintains the authority to impose civil penalties.

(c) It is not the intent of the Legislature to modify the level of penalty impositions beyond historic levels.

SEC. 2. Section 42400.4 of the Health and Safety Code is amended to read:

42400.4. (a) In any district where a Title V permit program has been fully approved by the federal Environmental Protection Agency, any person who knowingly violates any federally enforceable permit condition or any fee or filing requirement applicable to a Title V source is guilty of a misdemeanor and is subject to a fine of not more than ten thousand dollars (\$10,000).

(b) In any district in which a Title V permit program has been fully approved by the federal Environmental Protection Agency, any person who knowingly makes any false material statement, representation, or certification in any form or in any notice or report required of a Title V source of a federally enforceable permit requirement, or who knowingly renders inaccurate any monitoring device or method required of a Title

V source, is guilty of a misdemeanor and is subject to a fine of not more than ten thousand dollars (\$10,000).

(c) The recovery of civil penalties pursuant to Section 42402, 42402.1, 42402.2, or 42402.3 precludes prosecution pursuant to this section for the same offense. When a district refers a violation to a prosecuting agency, the filing of a criminal complaint is grounds requiring the dismissal of any civil action brought pursuant to this article for the same offense.

(d) Each day during any portion of which a violation of subdivision (a) or (b) occurs is a separate offense.

(e) This section shall not become operative in a district until the federal Environmental Protection Agency fully approves that district's Title V permit program.

(f) This section applies only to violations described in subdivisions (a) and (b) that are not otherwise subject to a fine of ten thousand dollars (\$10,000) or more pursuant to Section 42400.1, 42400.2, or 42400.3.

SEC. 3. Section 42410 is added to the Health and Safety Code, to read:

42410. (a) As an alternative to seeking civil penalties under Sections 39674, 42401, 42402, 42402.1, 42402.2, and 42402.3 for a violation of regulations of the state board, the state board may impose an administrative penalty, as specified in this section. Any administrative penalty imposed under this section shall be imposed as an alternative to, and not in addition to, a civil penalty imposed pursuant to this article. No administrative penalty imposed by the state board pursuant to this section shall exceed the amount that the state board is authorized to seek as a civil penalty for the applicable violation, and no administrative penalty imposed pursuant to this section shall exceed ten thousand dollars (\$10,000) for each day in which there is a violation up to a maximum of one hundred thousand dollars (\$100,000) per penalty assessment proceeding.

(b) Nothing in this section restricts the authority of the state board to negotiate mutual settlements under any other penalty provision of law that exceeds ten thousand dollars (\$10,000) for each day in which there is a violation of one hundred thousand dollars (\$100,000) per penalty assessment proceeding.

(c) The administrative penalties authorized by this section shall be imposed and recovered by the state board in administrative hearings established pursuant to Article 3 (commencing with Section 60065.1) and Article 4 (commencing with Section 60075.1) of Subchapter 1.25 of Chapter 1 of Division 3 of Title 17 of the California Code of Regulations, except that the hearings shall be conducted by an

administrative law judge appointed by the Office of Administrative Hearings.

(d) Nothing in this section authorizes the state board to seek penalties for categories of violations for which the state board may not recover penalties in a civil action.

(e) If the state board imposes any administrative penalties pursuant to this section, the state board may not bring any action pursuant to, or rely upon, Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code.

(f) In determining the amount of any administrative penalty imposed pursuant to this section, the state board shall take into consideration all relevant circumstances, including, but not limited to, those factors specified in subdivision (b) of Section 42403.

(g) After an order imposing an administrative penalty becomes final pursuant to the hearing procedures identified in subdivision (c), and no petition for a writ of mandate has been filed within the time allotted for seeking judicial review of the order, the state board may apply to the Superior Court for the County of Sacramento for a judgment in the amount of the administrative penalty. The application, which shall include a certified copy of the final order of the administrative hearing officer, shall constitute a sufficient showing to warrant the issuance of the judgment.

(h) For any violation that is within the enforcement jurisdiction of both the state board and the districts, the state board may impose an administrative penalty pursuant to this section only if the district in which the violation has occurred has not commenced an enforcement action for that violation.

(i) This section is not intended, and shall not be construed, to grant the state board authority to assess an administrative penalty for any category of violation that was not subject to enforcement by the state board as of January 1, 2002.

(j) Any administrative penalty assessed pursuant to this section shall be paid to the State Treasurer for deposit in the General Fund.

(k) A party adversely affected by the final decision in the administrative hearing may seek independent judicial review by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure.

(l) This section shall only apply to violations that occur on or after January 1, 2002.

(m) On or before January 30, 2005, the state board shall prepare and submit to the Legislature and the Governor a report summarizing the administrative penalties imposed by the state board pursuant to this section for calendar years 2002, 2003, 2004, and 2005.

SEC. 4. Section 42801 of the Health and Safety Code is amended to read:

42801. The Legislature finds and declares all of the following:

(a) It is in the best interest of the State of California, the United States of America, and the earth as a whole, to encourage voluntary actions to achieve all economically beneficial reductions of greenhouse gas emissions from California sources.

(b) Mandatory greenhouse gas emissions reductions may be imposed on California sources at some future point, and in view of this, the state has a responsibility to use its best efforts to ensure that organizations that voluntarily inventory their emissions receive appropriate consideration for changes in emissions quantities made prior to the implementation of any mandatory programs.

(c) Past initiatives in the state that took early and responsible action to reduce air pollution and ozone smog have demonstrated political, economic, and technological leadership, and have proven to benefit the state.

(d) The state's tradition of environmental leadership should be recognized through the establishment of a registry to provide documentation of greenhouse gas emissions levels voluntarily achieved by sources in the state. The registry will provide participants an opportunity to register greenhouse gas emissions information in a consistent format using publicly reviewed and adopted procedures and protocols.

(e) The state hereby commits to use its best efforts to ensure that organizations that establish greenhouse gas emissions baselines and register emissions results that are certified in accordance with this chapter receive appropriate consideration under any future international, federal, or state regulatory scheme relating to greenhouse gas emissions. The state cannot guarantee that any regulatory regime relating to greenhouse gas emissions will recognize the baselines and annual results recorded in the registry.

(f) The state hereby commits to review future international or federal programs related to greenhouse gas emissions and to make reasonable efforts to promote consistency between the state program and these programs and to reduce the reporting burden on participants, if changes to the state program are consistent with the goals and intent of Section 42810.

SEC. 5. Section 42801.1 is added to the Health and Safety Code, to read:

42801.1. For purposes of this chapter, the following terms have the following meanings:

(a) "Annual emissions results" means the participant's applicable data on the release of greenhouse gas emissions, both direct and indirect, from one particular year.

(b) "Baseline" means a datum against which to measure greenhouse gas emissions performance over time, usually annual emissions in a selected base year. For the purposes of this subdivision, the baseline shall start on or after January 1, 1990.

(c) "Certification" means the determination of whether a given participant's greenhouse gas emissions inventory (either baseline or annual result) has met a minimum quality standard and complied with an appropriate set of registry-approved procedures and protocols for submitting emissions inventory information. The process for certification of emissions results will be specified within the procedures and protocols approved for industry-specific emissions inventory reporting, and may involve a range of options depending upon the nature of the emissions, complexity of a company's facilities and operations, or both, and the procedures deemed necessary by the registry board to validate a participant's emissions information.

(d) "De minimis emissions" means emissions that are below a certain threshold, when summed across all applicable sources of the participating entity. The State Energy Resources Conservation and Development Commission shall recommend to the registry for adoption a threshold emissions level for each type of greenhouse gas emission that shall be considered de minimis.

(e) "Emissions" means the release of greenhouse gases into the atmosphere.

(f) (1) "Emissions inventory" means an accounting of the amount of greenhouse gases discharged into the atmosphere. It is generally characterized by all of the following factors:

- (A) The chemical or physical identity of the pollutants included.
- (B) The geographic area covered.
- (C) The institutional entities covered.
- (D) The time period over which emissions are estimated.
- (E) The types of activities that cause emissions.

(2) An emissions inventory shall include sufficient documentation and supporting data to make transparent the underlying assumptions and calculations for all of the reported results.

(g) "Greenhouse gases" includes all of the following gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.

(h) "Material" means any emission of greenhouse gas that is not de minimis.

SEC. 6. Section 42810 of the Health and Safety Code is amended to read:

42810. The purposes of the California Climate Action Registry shall be to do all of the following:

(a) Help various entities in the state to establish emissions baselines against which any future federal greenhouse gas emission reduction requirements may be applied.

(b) Encourage voluntary actions to increase energy efficiency and reduce greenhouse gas emissions.

(c) Enable participating entities to voluntarily record greenhouse gas emissions made after 1990 in a consistent format that is certified.

(d) Ensure that sources in the state receive appropriate consideration for certified emissions results under any future federal regulatory regime relating to greenhouse gas emissions.

(e) Recognize, publicize, and promote participants in the registry.

(f) Recruit broad participation in the process from all economic sectors and regions of the state.

SEC. 7. Section 42821 of the Health and Safety Code is amended to read:

42821. (a) The registry shall be governed by a seven-member board of directors, to be composed of all of the following members:

(1) The Secretary of the Resources Agency, or his or her designee.

(2) The Secretary for Environmental Protection, or his or her designee.

(3) Five public members representing business, local government, and public interest environmental organizations, to be appointed by the Governor for two-year terms, staggered so that, initially, three public members serve one-year terms and two members serve two-year terms. In the event of a vacancy, the Governor shall appoint a replacement public board member.

(b) The board of directors of the registry is responsible for ensuring that the registry fulfills the purposes established by this chapter and meets the financial, reporting, and operating requirements of its articles of incorporation. The board of directors shall appoint and supervise an executive director, who shall hire and direct staff.

(c) The board of directors shall adopt bylaws that ensure that, at each regularly scheduled meeting of the registry, there will be an opportunity for members of the public to comment on matters being considered by the registry, as specified on the registry meeting agenda.

SEC. 8. Section 42822 of the Health and Safety Code is amended to read:

42822. (a) The procedures and protocols for monitoring, estimating, calculating, reporting, and certifying greenhouse gas

emissions established by, or approved pursuant to, this chapter shall be the only procedures and protocols recognized by the state for the purposes of the registry, as described in Section 42810. These procedures shall be, to the extent practicable, consistent with the methods and practices used for the statewide inventory of greenhouse gas emissions prepared by the State Energy Resources Conservation and Development Commission, as required by Section 25730 of the Public Resources Code.

(b) The registry shall adopt a schedule of fees and, after an initial startup period, charge participants for registry services to cover the reasonable costs of its operations.

SEC. 9. Section 42823 of the Health and Safety Code is amended to read:

42823. The registry shall perform all of the following functions:

(a) Provide participants with referrals to approved providers for technical assistance and advice, upon the request of a participant, on any or all of the following:

(1) Designing programs to establish greenhouse gas emissions baselines and to monitor, estimate, calculate, report, and certify greenhouse gas emissions.

(2) Establishing emissions reduction goals based on international or federal best practices for specific industries and economic sectors.

(3) Designing and implementing organization-specific plans that improve energy efficiency or utilize renewable energy, or both, and that are capable of achieving emission reduction targets.

(b) In coordination with the State Energy Resources Conservation and Development Commission, the registry shall adopt and periodically update a list of organizations recognized by the state as qualified to provide the detailed technical assistance and advice in subdivision (a) and assist participants in identifying and selecting providers that have expertise applicable to each participant's circumstances.

(c) Adopt procedures and protocols for certification of reported baseline emissions and emissions results. When adopting procedures and protocols for the certification, the registry shall consider the availability and suitability of simplified techniques and tools.

(d) Qualify third-party organizations that have the capability to certify reported baseline emissions and emissions results, and that are capable of certifying the participant-reported results as provided in this chapter.

(e) Adopt procedures and protocols, including a uniform format for reporting emissions baselines and emissions results to facilitate their recognition in any future regulatory regime.

(f) Maintain a record of all certified greenhouse gas emissions baselines and emissions results. Separate records shall be kept for direct and indirect emissions results. The public shall have access to this record, except for any portions of a participant's emissions results that a participant may deem confidential.

(g) Encourage organizations from various sectors of the state's economy, and those from various geographic regions of the state, to report emissions, establish baselines and reduction targets, and implement efficiency improvement and renewable energy programs to achieve those targets.

(h) Recognize, publicize, and promote participants.

(i) In coordination with the State Energy Resources Conservation and Development Commission and the State Air Resources Board, adopt industry-specific reporting metrics at one or more public meetings.

SEC. 10. Section 42824 of the Health and Safety Code is amended to read:

42824. Participation in the registry is voluntary, and participants may withdraw at any time. If participants cease, and then resume participation, they will be expected to fill in any interim emissions information or set a new baseline. Any entity conducting business in the state may register its emissions results, including emissions generated outside of the state, on an entitywide basis with the registry, and may utilize the services of the registry.

SEC. 11. Section 42840 of the Health and Safety Code is amended to read:

42840. (a) Participants shall utilize the following reporting procedures to establish a greenhouse gas emissions baseline, participants shall report their certified emissions for the most recent year for which they have complete energy use and fuel consumption data as specified in this chapter. Participants that have complete energy use or fuel consumption data for earlier years that can be certified may establish their baseline as any year beginning on or after January 1, 1990. After establishing baseline emissions, participants shall report their certified emissions results in each subsequent year in order to show changes in emissions levels with respect to their baseline year. Participants may report annual emission results without establishing an emissions baseline. Participants shall also report using industry-specific metrics once the registry adopts an industry-specific metric for the industry in question.

(b) (1) Participants shall report direct emissions and indirect emissions separately. Direct emissions are those emissions from applicable sources that are under management control of a participating entity, including onsite combustion, fugitive noncombustion emissions,

and vehicles owned and operated by the participant. Indirect emissions that are required to be reported by participants are those emissions embodied in net electricity and steam imports, including offsite steam generation and district heating and cooling. Participants are encouraged, but are not required, to report other indirect emissions based on guidance that is adopted by the registry.

(2) On or after January 1, 2004, the registry board, in coordination with the State Energy Resources Conservation and Development Commission, may revise the scope of indirect emission source types that are required to be reported by participants specified in paragraph (1) after a public workshop and review process conducted by the registry if all of the following requirements have been met.

(A) The State Energy Resources Conservation and Development Commission has approved that revision at a public hearing following a public workshop.

(B) Prior to approving that proposed revision, the commission determines all of the following:

(i) A reasonable and generally-accepted methodology exists that will enable participants to accurately estimate and report the emissions for the indirect source type in question.

(ii) The proposed revision will not create an unreasonable reporting burden on the participants.

(iii) The proposed revision is necessary to achieve the purposes listed in Section 42810.

(C) The registry, at any time it acts to revise the scope of indirect emission source types that are required to be reported by participants, establishes a timeframe for the phase in of the revised scope so that participants shall have at least four months before the start of the next annual reporting cycle that incorporates the revised scope.

(3) In cases of joint ownership, emissions are reported by the managing entity, unless the owners decide to report emissions on a pro rata basis.

(4) Participants shall not be required to report emissions of any greenhouse gas that is de minimis in quantity, when summed up across all applicable sources of the participating entity. The State Energy Resources Conservation and Development Commission shall recommend to the registry a definition of de minimis emissions that reasonably accounts for differences in the size, activities, and sources of direct and indirect baseline emissions of participants, and is consistent with the goals and intent of subdivision (f) of Section 42801.

(c) (1) All participants shall report direct and indirect carbon dioxide (CO₂) emissions that are material to their operations.

(2) The registry shall also encourage participants to monitor and report emissions of the following gases:

- (A) Hydrofluorocarbons (HFCs).
- (B) Methane (CH₄).
- (C) Oxides of nitrogen (N₂O).
- (D) Perfluorocarbons (PFCs).
- (E) Sulfur hexafluoride (SF₆).

(3) The report of information specified in paragraph (2) is optional for three years after a participant joins the registry. After participating in the registry for a total of three years, participants shall report emissions required by both paragraphs (1) and (2).

(4) Emissions of all gases under this subdivision shall be reported in mass units.

(d) The basic unit of participation in the registry shall be an entity in its entirety such as a corporation or other legally constituted body, any city or county, and each state government agency. The registry shall not record emissions baselines and reductions for individual facilities or projects, except to the extent they are included in an entity's emissions reporting.

(1) Corporations may report emissions baselines and annual emissions results from subsidiaries if the parent corporation is clearly defined.

(2) Participants shall report emissions from all of their applicable sources in the state when they initially register.

(3) Participants may, and are encouraged to, at any time, register emissions from all applicable sources based in the United States, so long as this reporting meets all the other requirements established by this chapter. Those participants with emissions in other states that report California emissions only may not be able to receive equal consideration for their emissions records in future national or international regulatory regimes relating to greenhouse gas emissions. In addition, participants with operations outside of the United States are encouraged to register their total worldwide emissions baselines and annual emissions results. Within three years, the registry shall review and report to the Legislature with a recommendation on whether the registry should require, rather than encourage, participants to report all of their greenhouse gas emissions in the United States, not just California emissions.

(4) To ensure that reported emissions reflect actual emissions, participants that outsource production or services shall report emissions associated with the outsourced activity, and remove these emissions from their emissions baseline. The subcontracted entity, if it voluntarily chooses to participate in the registry shall report emissions associated with the outsourced activities it has taken over. Participants shall attest

at least once each year that the entity has not outsourced any emissions, or that if it has, that all emissions associated with the outsourced activity have been reported and subtracted from the entity's baseline emissions.

(5) To prevent changes in vertical integration within corporations from leading to apparent emissions reductions when in fact no reductions have occurred, the registry shall treat mergers, acquisitions, and divestitures as follows:

(A) The emissions baselines of any merged or acquired entity shall be added together, and the registry shall treat the resulting entity as if it had been one corporation from the beginning.

(B) In divestitures, the emissions baselines of the affected corporations shall be split, with the effect that the registry shall treat them as if they had been separate corporations from the beginning. If the divested corporation is purchased by another firm, the registry shall treat that purchase as a merger with the purchasing corporation. If the divested corporation remains a separate entity after the divestiture, its registry baseline shall reflect the emissions associated with the entity's operations before the divestiture. Corporations that divest operations may allocate certified emissions results achieved prior to the divestiture among the divesting and the divested entities, and the registry shall adjust their baselines accordingly.

(C) Any adjustments for changes in vertical integration shall be verified in the annual emissions certifications required for recordation of emissions results.

(6) If a participant changes from statewide to national reporting under this program, changes to its baseline will be treated in a similar manner as changes in vertical integration as described in paragraph (5).

(7) To ensure that reported emissions accurately reflect shifts in operations to or from other states, the registry shall adopt, in consultation with the State Energy Resources Conservation and Development Commission, at a public meeting and following at least one public workshop, reporting procedures for participants that choose to report greenhouse emissions on a statewide basis that require participants to show both of the following:

(A) Changes in a participant's operations, such as a facility startup or shutdown, that result in a significant and long-term shift of greenhouse gas emissions from California to other states or from other states to California.

(B) The corresponding change in the participant's baseline.

SEC. 12. Section 42841 of the Health and Safety Code is amended to read:

42841. (a) To support the estimation, calculation, reporting, and certification of emissions in a consistent format, the registry shall adopt

standardized forms that all participants shall use to calculate, report, and certify emissions, unless an alternative format is (1) reviewed and recommended by the State Energy Resources Conservation and Development Commission and the State Air Resources Board, and (2) adopted by the registry, and deemed to be consistent with the goals and intent of this chapter. In cooperation with the State Energy Resources Conservation and Development Commission, the registry shall review commonly available emissions tracking software to determine whether existing software packages are able to generate reports for the registry.

(b) The procedures established for all of the following shall conform to the requirements of Article 6 (commencing with Section 42870):

(1) Establishing electricity and fuel usage and for calculating associated emissions.

(2) Mass-balance calculations, stack testing, or continuous emissions monitoring of greenhouse gases from onsite fuel combustion are all acceptable ways of reporting greenhouse gases from onsite fuel combustion.

(3) Estimating, calculating, reporting, and certifying noncombustion emissions of the gases listed in paragraphs (1) and (2) of subdivision (c) of Section 42840.

(4) Collecting and maintaining data and records of energy, fuel, and chemical consumption sufficient to allow contemporaneous and ex post certification of direct and indirect emissions.

SEC. 13. Section 42842 of the Health and Safety Code is amended to read:

42842. (a) Participants registering baseline emissions and emissions results in the registry shall provide certification of their methodologies and results. The registry board may, upon recommendation of the State Energy Resources Conservation and Development Commission and the state board, following a public process, adopt simplified procedures to certify emissions results as appropriate. Participants shall follow registry-approved procedures and protocols in determining emissions, and supply the quantity and quality of information necessary to allow an independent ex post certification of the emissions baseline and emissions results reported under this program.

(b) The registry shall adopt a list of approved third-party organizations recognized as competent to certify emissions results as provided in this chapter. The process for evaluating and approving these organizations shall be developed in coordination with the State Energy Resources Conservation and Development Commission. The registry may reopen the qualification process periodically in order for new organizations to be added to the approved list.

(c) As appropriate, the registry shall refer participants to the organization on the approved list described in subdivision (b).

(d) Where required by the registry for certification, organizations approved pursuant to subdivision (b) shall do all of the following:

(1) Evaluate whether the participant has a program, consistent with registry-approved procedures and protocols, in place for preparation and submittal of the information reported under this chapter.

(2) Check, during certification, the reasonableness of the emissions information being reported for a random sample of estimates or calculations.

(3) Summarize its review in a report to the board of directors, or equivalent governing body, of the participating entity, attesting to the existence of a program that is consistent with registry-approved procedures and protocols and the reasonableness of the reported emissions results and noting any exceptions, omissions, limitations, or other qualifications to their representations.

(e) In conducting certification for a participant under this program, the approved organization shall schedule any meeting or meetings with the participant in advance at one or more representative locations and allow the participant to control property access. The meetings shall be conducted in accordance with a protocol that is agreed upon in advance by the participant and the approved organization. The approved organization shall not perform facility inspection, direct measurement, monitoring, or testing unless authorized by the participant.

(f) To ensure the integrity and constant improvement of the registry program, the State Energy Resources Conservation and Development Commission shall perform on a random basis an occasional review and evaluation of participants' emissions reporting, certifications, and the reasonableness of the emissions information being reported for analysis of estimates or calculations. The commission shall report any findings in writing to the registry. The registry shall include a summary of these findings in the biennial report to the Governor and the Legislature required by Article 5 (commencing with Section 42860).

SEC. 14. Section 42843 of the Health and Safety Code is amended to read:

42843. Not later than July 1, 2003, and periodically thereafter, the registry shall evaluate and review the approaches to emissions reporting described in subdivision (b) of Section 42840, in light of knowledge gained from the actual practices of estimating, calculating, reporting, and certifying emissions, and, upon recommendation of the State Energy Resources Conservation and Development Commission following a public process, may modify or revise reporting requirements as appropriate to further the purposes of this chapter.

SEC. 15. Section 42860 of the Health and Safety Code is amended to read:

42860. Not later than July 1, 2003, and biennially thereafter, the registry shall report to the Governor and the Legislature on the number of organizations participating in the registry, the percentage of the state's emissions represented by the participants in the registry, the reductions in greenhouse gas emissions achieved by those participants, and ways to make the registry more workable for participants that are consistent with the goals and intent of this chapter.

SEC. 16. Section 42870 of the Health and Safety Code is amended to read:

42870. The State Energy Resources Conservation and Development Commission shall do all of the following:

(a) Develop a process to identify and qualify third-party organizations approved to provide technical assistance and advice, upon the request of a participant in any or all of the following areas:

- (1) Determining greenhouse gas emissions.
- (2) Developing industry-specific emissions reduction targets.
- (3) Developing and implementing efficiency improvement programs appropriate to various industries and economic sectors.

The process shall do all of the following:

(A) Define the minimum technical and organizational capabilities and other qualifications approved firms are required to meet.

(B) Call for applications or otherwise encourage interested organizations to submit their qualifications for review.

(C) Evaluate applicant organizations according to this list of qualification standards.

(D) Recommend, not later than six months following the first registry board meeting, specific organizations to the registry as qualified to provide the technical assistance functions of this chapter.

(E) Update the list of approved technical assistance providers periodically by doing all of the following:

- (i) Reviewing the capabilities of already approved providers.
- (ii) Reviewing applications of new providers.
- (iii) Recommending to the registry specific organizations to be added to the approved list, and specific organizations no longer qualified to provide the technical assistance duties of this chapter.

(b) Develop or update certain emissions reporting metrics by doing all of the following:

- (1) Review, in coordination with the State Air Resources Board, industry-specific greenhouse gas reporting metrics linked to or based on international or federal standards, as these become available periodically, and advise the registry of its opinion as to whether the

adoption of sectoral or industry-specific metrics complement the reporting procedures.

(2) By July 1, 2003, recommend to the registry for possible adoption a procedure for defining and measuring transportation-based emissions associated with registry participants' activities, including, but not limited to, shipping of products and materials, employee commuting, and purchased air travel.

(c) Develop, not later than six months following the first registry board meeting, guidance to the registry on all of the following processes to facilitate participation in the program:

(1) Recommendations for threshold emissions of each greenhouse gas that are considered de minimis to a participant's operations.

(2) Establishing entities' electricity usage and calculating CO₂ emissions associated with that usage.

(3) Establishing entities' fuel usage and calculating CO₂ emissions associated with that usage.

(4) Determining emissions from onsite fuel combustion.

(5) Determining the noncombustion emissions of the six greenhouse gases with which the registry is concerned, as applicable.

(6) Establishing procedures and protocols to certify greenhouse gas emissions baselines and emissions results.

(7) Collecting and maintaining data and records of energy, fuel, and chemical consumption sufficient to allow ex post certification of emission results of direct and indirect emissions on an entity-wide basis.

(d) Develop, not later than six months after the first meeting of the registry board, a process for qualifying third-party organizations recognized by the State of California as competent to certify the emissions results of the types of entities that may choose to participate in this registry, by doing all of the following:

(1) Developing a list of the minimum technical and organizational capabilities and other qualification standards that approved third-party organizations shall meet. Those qualifications shall include the ability to sign an opinion letter, for which they may be held financially at risk, and certifying the participant-reported emissions results as provided in this chapter.

(2) Publicizing an applications process or otherwise encouraging interested organizations to submit their qualifications for review.

(3) Evaluating applicant organizations according to the list of qualifications described in paragraph (1).

(4) Recommending specific third-party organizations to the registry as qualified to certify participants' actual emissions results in accordance with this chapter.

(5) Periodically updating the list of approved third-party organizations by doing any of the following:

(A) Reviewing the capabilities of approved organizations.

(B) Reviewing applications of organizations seeking to become approved.

(C) Recommending to the registry specific organizations to be added to the approved list, and specific organizations no longer qualified to perform the duties of this chapter.

(e) (1) Occasionally, and on a random basis, accompany third-party organizations on scheduled visits to observe and evaluate, during any certification visit, both the following:

(A) Whether the participant has a program, consistent with registry-approved procedures and protocols, in place for the preparation and submittal of the information required under this chapter.

(B) The reasonableness of the emissions information being reported for a sample of estimates or calculations.

(2) To help the registry report to the Legislature, the State Energy Resources Conservation and Development Commission shall report, in writing, to the registry on these findings to further ensure that reported emissions accurately reflect annual emissions of greenhouse gases.

(f) Review future international or federal programs related to greenhouse gas emissions, and make reasonable efforts to promote consistency between the state program and these programs, and to reduce the reporting burden on participants.

SEC. 17. Section 43021 of the Health and Safety Code is amended to read:

43021. (a) For purposes of this section, "motor vehicle fuel distributor" means any person who (1) refines, blends, or otherwise produces motor vehicle fuel, or (2) with an ownership interest in the fuel, transports or causes the transport of motor vehicle fuel at any point between a production or import facility and a retail outlet, or sells, offers for sale, or supplies motor vehicle fuel to motor vehicle fuel retailers.

(b) Any motor vehicle fuel distributor who conducts business within the state, annually on January 1, shall inform the state board in writing of the distributor's principal place of business, which shall be a physical address and not a post office box, and any other place of business at which company records are maintained or refining activities are conducted.

(c) The state board shall supply each complying motor vehicle fuel distributor with a certificate of compliance with this section not later than June 30. The certificate shall be effective from July 1 of the year of issuance through June 30 of the following year.

(d) All motor vehicle fuel distributors shall maintain complete records of each purchase, delivery, or supply of motor vehicle fuel for a period of not less than two years in the physical locations reported pursuant to subdivision (b) and shall not move the records to another physical location without notifying the state board of the new location. A complete record for each delivery shall consist of not less than a copy, or the information contained therein, of the bills of lading from the refinery or bulk terminal from which the fuel is received, the delivery ticket or receipt showing the location of the fuel at the time of sale, and the invoice showing the purchaser of the fuel. All those records may be kept in physical or electronic format and are subject to inspection and duplication by the state board.

(e) Any motor vehicle fuel distributor who intentionally fails to comply with subdivision (b) or (d) is liable for a civil penalty not to exceed one thousand dollars (\$1,000) for each day of noncompliance.

(f) No person shall knowingly transport motor vehicle fuel for any motor vehicle fuel distributor who is not in possession of a current certificate of compliance as described in subdivision (c). Any person who transports or provides vehicles to transport motor vehicle fuel for a noncomplying distributor is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each day. However, any person who transports, or provides vehicles to transport, motor vehicle fuel for a distributor who is in possession of a current certificate of compliance shall not be liable for any penalties under this subdivision unless that person has specific knowledge of noncompliance.

(g) Any retailer who knowingly sells or supplies motor vehicle fuel that was delivered to the retailer by, or on behalf of, a noncomplying motor vehicle fuel distributor is liable for a civil penalty not to exceed ten thousand dollars (\$10,000) for each transaction.

(h) Any retailer who sells motor vehicle fuel that does not comply with regulations of the state board, after both oral and written notice to cease have been delivered to the owner, manager, or attendant on duty at the facility, and upon failure to comply with that notice, is subject to the issuance of a cease and desist order by the state board and a penalty of ten thousand dollars (\$10,000) for each day of noncompliance with the cease and desist order.

(i) The state board shall annually compile and publish a complete listing of all certified wholesale petroleum distributors, and shall mail a copy to every licensed transporter of petroleum products.

(j) This section shall become operative January 1, 2003.

SEC. 18. Section 43023 is added to the Health and Safety Code, to read:

43023. (a) As an alternative to seeking civil penalties under Chapter 1 (commencing with Section 43000) to Chapter 4 (commencing with Section 43800), inclusive, and Chapter 6 (commencing with Section 44200), for violation of state board regulations, the state board may impose an administrative penalty, as specified in this section, for a violation of this part, or any rule, regulation, permit, variance, or order of the state board pertaining to vehicular air pollution control except as otherwise provided in this division. No administrative penalty imposed pursuant to this section shall exceed the amount that the state board is authorized to seek as a civil penalty for the applicable violation, and no administrative penalty imposed pursuant to this section shall exceed ten thousand dollars (\$10,000) for each day in which there is a violation up to a maximum of one hundred thousand dollars (\$100,000) per penalty assessment proceeding for any violation arising from the same conduct. This one hundred thousand dollar (\$100,000) maximum penalty limitation does not apply in any judicial proceeding involving violations committed under this part.

(b) Nothing in this section restricts the authority of the state board to negotiate mutual settlements under any other penalty provision of law that exceeds ten thousand dollars (\$10,000) for each day in which there is a violation up to a maximum of one hundred thousand dollars (\$100,000) per penalty assessment proceeding.

(c) The administrative penalties authorized by this section shall be imposed and recovered by the state board in administrative hearings established pursuant to Article 3 (commencing with Section 60065.1) and Article 4 (commencing with Section 60075.1) of Subchapter 1.25 of Chapter 1 of Division 3 of Title 17 of the California Code of Regulations, except that the hearings shall be conducted by an administrative law judge appointed by the Office of Administrative Hearings.

(d) Nothing in this section authorizes the state board to impose penalties for categories of violations for which the state board may not seek penalties in a civil action.

(e) If the state board imposes any administrative penalties pursuant to this section, the state board may not bring any action pursuant to, or rely upon, Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code.

(f) In determining the amount of any administrative penalty imposed pursuant to this section, the state board shall take into consideration all relevant circumstances, including, but not limited to, those factors specified in subdivision (b) of Section 43031.

(g) After an order imposing an administrative penalty becomes final pursuant to the hearing procedures identified in subdivision (c), and no

petition for a writ of mandate has been filed within the time allotted for seeking judicial review of the order, the state board may apply to the Superior Court for the County of Sacramento for a judgment in the amount of the administrative penalty. The application, which shall include a certified copy of the final order of the administrative hearing officer, shall constitute a sufficient showing to warrant the issuance of the judgment.

(h) This section does not apply to any violation for which a penalty may be assessed pursuant to Chapter 1.5 (commencing with Section 43025).

(i) This section is not intended, and shall not be construed, to grant the state board authority to assess an administrative penalty for any category of violation that was not subject to enforcement by the state board as of January 1, 2002.

(j) Any administrative penalty assessed pursuant to this section shall be paid to the State Treasurer for deposit in the General Fund.

(k) A party adversely affected by the final decision in the administrative hearing may seek independent judicial review by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure.

(l) This section applies only to violations that occur on or after January 1, 2002.

(m) On or before January 1, 2005, the state board shall prepare and submit to the Legislature and the Governor a report summarizing the administrative penalties imposed by the state board pursuant to this section for calendar years 2002, 2003, 2004, and 2005.

